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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

C. P. POMEROY,
REPORTER.

VOLUME 153.

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BANCROFT-WHITNEY COMPANY,
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FEB 5 1909

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[Constitution, article VI, section 2.]

SEC. 2. The Supreme Court shall consist of a chief justice and six associate justices. The Court may sit in departments and in Bank, and shall always be open for the transaction of business. There shall be two departments, denominated, respectively, Department One and Department Two. The chief justice shall assign three of the associate justices to each department, and such assignment may be changed by him from time to time. The associate justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves, or as ordered by the chief justice. Each of the departments shall have the power to hear and determine causes, and all questions arising therein, subject to the provisions hereinafter contained in relation to the Court in Bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment. The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the Court to be heard and decided by the Court in Bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two associate justices, and if so made it shall have the effect to vacate and set aside the judgment. Any four justices may, either before or after judgment by a department, order a case to be heard in Bank. If the order be not made within the time above limited, the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice, in writing, with the concurrence of two associate justices. The chief justice may

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convene the Court in Bank at any time, and shall be the presiding justice of the court when so convened. The concurrence of four justices present at the argument shall be necessary to pronounce a judgment in Bank; but if four justices, so present, do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment, a concurrence of four judges shall be necessary. In the determination of causes, all decisions of the Court in Bank or in departments shall be given in writing, and the grounds of the decision shall be stated. The chief justice may sit in either department, and shall preside when so sitting, but the justices so assigned to each department shall select one of their number as presiding justice. In case of the absence of the chief justice from the place at which the Court is held, or his inability to act, the associate justices shall select one of their own number to perform the duties and exercise the powers of the chief justice during such absence or inability to act.

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- City of Escondido v. Bank of Escondido.** Judgment and order affirmed on the authority of **City of Escondido v. Wohlford**, 153 Cal. 40L. A. No. 1946
- Estate of Bowen.** Order affirmed on the authority of **Estate of Martin**, 153 Cal. 225.....S. F. No. 4669
- People v. Lebus.** Judgment affirmed on the authority of **Estate of Moffitt**, 153 Cal. 359.....L. A. No. 2178
- People v. Schmitz.** Opinion refusing a hearing in the Supreme Court after judgment in the District Court of Appeal, reported in 7 Cal. App. 369.....Crim. No. 1451

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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

[L. A. No. 1977. Department One.—February 1, 1908.]

TITLE INSURANCE AND TRUST COMPANY, Executor
of the Will of Rosetta S. Ingersoll, Deceased, Appellant,
v. C. K. INGERSOLL, Respondent.

HUSBAND AND WIFE—POWER TO TRANSMUTE SEPARATE PROPERTY INTO
COMMUNITY PROPERTY.—A husband and wife may by contract trans-
mute the separate property of either into community property.

J_D.—ACTION BY WIFE TO ENFORCE TRUST—CONTROL BY HUSBAND OF
WIFE'S PROPERTY—PRESUMPTION OF TRUST—BURDEN OF PROOF.—
In an action by the wife to enforce a trust against the husband
in respect of her separate property, the mere fact that the husband,
with her consent, had the management and control of her separate
property, does not show any intention on her part to make a gift
thereof to the husband, or to change it into community property.
The presumption in such case is that it continues to be her separate
property, and that the husband takes the *corpus* or principal of such
property in trust for the wife; and the burden of proof is upon
the husband to show an intended change by the wife in the *status*
of her property.

I_D.—EXPRESS AGREEMENT NOT ESSENTIAL—CIRCUMSTANTIAL PROOF—
SUPPORT OF FINDINGS FOR HUSBAND.—It is not essential, in order
to support findings for the husband, that the understanding between
the husband and wife was that her separate money delivered to him
should be treated as community property, and that the wife con-
verted it into community property, that the husband should show
an express agreement to that effect on the part of the wife. The
change in the *status* of the property may be shown by the nature
of the transaction, or appear from surrounding circumstances, if
clearly evincing the intention of the wife to change such *status*.

I_D.—DEPOSIT OF WIFE'S MONEY TO CREDIT OF HUSBAND'S ACCOUNT IN
BANK—EVIDENCE OF HUSBAND—USE AS COMMUNITY PROPERTY.—
CLIII Cal.—1

The evidence of the husband that the bulk of the money derived from sales of the wife's separate property, was deposited by the wife to the credit of the account of the husband in a local bank, where he kept his money, and that he drew from the same in payment of all general expenses of himself and wife, and for purposes of investment of property in his own name, and that it was generally understood between them, without express words, that this was a common fund, to be used indiscriminately for the benefit of the community, and that it was so treated for fifteen years, without objection by her or demand for an accounting, is sufficient, notwithstanding opposing circumstances, to sustain the finding in favor of the husband.

ID.—TRACING OF WIFE'S MONEY INTO REAL ESTATE.—Where the record shows, without conflict, that some of the money of the wife that came into the hands of the husband, was clearly traced into other property, a finding that none of the money could be traced is not fully sustained. If there was no change in the *status* of her separate property, and a portion of it can be clearly traced, she is entitled to the relief asked in respect thereto.

ID.—PREJUDICIAL ERROR IN TESTIMONY FOR HUSBAND—EVIDENCE OF GOOD CHARACTER.—Where the evidence in support of the finding rested almost entirely upon the testimony of the husband, and there was no evidence impeaching his good character, and the case, viewed in the light most favorable to defendant, was a close one on the facts, in consideration of the burden of proof resting upon him, it was prejudicially erroneous, against the plaintiff's objection, to admit the testimony of witnesses for the husband to his good character for truth, honesty and integrity.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.
G. A. Gibbs, Judge.

The facts are stated in the opinion of the court.

Stephens & Stephens, for Appellant.

There was a presumption of undue influence by the husband over the wife, there being no consideration for passing the title of her separate property. (Civ. Code, secs. 158, 2235; *White v. Warren*, 120 Cal. 322, 45 Pac. 129, 52 Pac. 723; *Stiles v. Cain*, 134 Cal. 173, 174, 66 Pac. 231.) There is a presumption of continuance of the wife's title to her separate property in the husband's possession, and the husband must clearly show the contrary. (*Freese v. Hibernia etc. Soc.*, 139 Cal. 392, 73 Pac. 172; *Denigan v. Hibernia etc. Soc.*, 127 Cal.

139, 59 Pac. 389; *In re Bauer*, 79 Cal. 304, 310, 21 Pac. 759; Wells on Separate Property of Married Women, pp. 224, 226, and cases cited.) There is a presumption that the husband held the wife's property in trust, though invested in his own name. (*Stickney v. Stickney*, 131 U. S. 227, 9 Sup. Ct. 677; *Johnston v. Johnston*, 31 Pa. St. 450; *Methodist Episcopal Church v. Jaques*, 1 John. Ch. 450; *Hileman v. Hileman*, 85 Ind. 1; *Denny v. Denny*, 123 Ind. 240, 23 N. E. 519; *Armocost v. Lindley*, 116 Ind. 295, 19 N. E. 138; *Patten v. Patten*, 75 Ill. 446, 451; *Chadbourne v. Williams*, 45 Minn. 294, 47 N. W. 812, 813; *Wales v. Newbould*, 9 Mich. 45, 63, 65; *Carter v. Becker*, 69 Kan. 524, 77 Pac. 264; *Heinrich v. Heinrich*, 2 Cal. App. 479, 483, 84 Pac. 326.) A trustee who wrongfully commingles trust funds is in no better condition than one who keeps them separated. (Perry on Trusts, 5th ed., secs. 837, 838, 839, 841; *Gunter v. James*, 9 Cal. 657, 660; *Docker v. Somes*, 2 Mylne & K. 655.) The court erred in admitting evidence of defendant's good character. (Code Civ. Proc., sec. 2053.)

Valentine & Newby, for Respondent.

The commingling of separate with community property so that they cannot be separated, draws the whole to it and makes it community property. (Ballinger on Community Property, secs. 17, 68, pp. 44, 107.) In such case the separate property must be duly traced and located by proof, else it must be deemed community property. (*Meyer v. Kinzer*, 12 Cal. 247, 251, 73 Am. Dec. 538; *Dimmick v. Dimmick*, 95 Cal. 323, 30 Pac. 547; *Reid v. Reid*, 112 Cal. 278, 44 Pac. 564; *In re Boody*, 113 Cal. 684, 45 Pac. 858; *Lake v. Bender*, 18 Nev. 361, 7 Pac. 74; *Brown v. Lockhart*, 12 N. Mex. 10, 71 Pac. 1086; *Nixon v. Wichita Land etc. Co.*, 84 Tex. 408, 19 S. W. 560; *Manning's Succession*, 107 La. 456, 31 South. 862; *Hill v. Young*, 7 Wash. 33, 34 Pac. 144.) A wife has the power to alter the legal relation of her separate property. (Civ. Code, secs. 158, 159; *Yoakam v. Kingery*, 126 Cal. 33, 58 Pac. 324; *Tillaux v. Tillaux*, 115 Cal. 672, 47 Pac. 691; *Burkett v. Burkett*, 78 Cal. 312, 12 Am. St. Rep. 58, 20 Pac. 715.) Defendant did not take the wife's funds as trustee, they being commingled with his own funds. (*Estate of*

Dutard, 147 Cal. 257, 81 Pac. 315; *Byrne v. Byrne*, 123 Cal. 294, 45 Pac. 536; *Lathrop v. Bampton*, 31 Cal. 23, 24, 25, 89 Am. Dec. 141.) The course of conduct of the wife shows that she regarded the deposits in the bank in her husband's name as community property, and she is estopped by her own conduct from claiming the contrary, to her husband's prejudice in expenditures. (10 Cyc. 158 and notes; *Abrams v. Ordway*, 158 U. S. 416, 15 Sup. Ct. 894; *Willard v. Wood*, 164 U. S. 502, 17 Sup. Ct. 176; *Penn Mutual L. Ins. Co. v. Austin*, 168 U. S. 685, 18 Sup. Ct. 223; *Courtright v. Courtright*, 53 Iowa, 57, 4 N. W. 824; *Darnaby v. Darnaby*, 14 Bush. (Ky.) 485.) The evidence of good character was admissible in view of the testimony of plaintiff's witnesses tending to contradict the husband's testimony. (*People v. Ah Fat*, 48 Cal. 63; *People v. Amanacus*, 50 Cal. 234; *People v. Crandall*, 125 Cal. 129, 57 Pac. 785; Code Civ. Proc., secs. 2051, 2052.) The evidence was not prejudicial and would not justify a reversal. (*People v. Murray*, 85 Cal. 350, 24 Pac. 666; *Alexander v. Central L. & M. Co.*, 104 Cal. 532, 38 Pac. 410; Code Civ. Proc., secs. 475, 1847.)

ANGELLOTTI, J.—This action was instituted October 16, 1903, by Rosetta S. Ingersoll against her husband, C. K. Ingersoll, to enforce an alleged trust as to certain real and personal property standing in the name of defendant, and to obtain an accounting from defendant as trustee, and a judgment against him for any money that should be found due plaintiff thereon. Mrs. Ingersoll died prior to the trial of the action, and the executor of her will has been substituted as plaintiff. This is an appeal by plaintiff from the judgment given in favor of defendant and from an order denying a motion for a new trial.

The theory of plaintiff's case, as shown by the complaint, was that the property in controversy was the proceeds of money constituting separate property of Mrs. Ingersoll, and that such money had been received by defendant with her acquiescence and consent, upon the understanding and agreement that he should receive and hold the same and all property in which the same might be invested, if invested in his name, in trust for her use and benefit. The defendant, by his answer, admitted the acquisition by his wife by gift, bequest,

or devise, of some twenty thousand dollars or thereabouts, and the receipt and subsequent control and possession of a large portion thereof by himself, but denied any agreement that he was to hold the same in trust for her. He alleged, on the contrary, that the understanding was that all the money so delivered to him should thenceforth be treated as community property, and that it was always so considered and treated, and that his wife converted it into community property. The trial court found in favor of defendant upon these matters. There can be no doubt that a husband and wife may by contract transmute the separate property of either or both into community property. (*Yoakam v. Kingery*, 126 Cal. 30, 32, [58 Pac. 324]; *Estate of McCauley*, 138 Cal. 550, [71 Pac. 458].) These findings are vigorously attacked on this appeal.

We are of the opinion that the evidence cannot be held legally insufficient to support these findings. It may be conceded that the mere acquirement of the possession of a wife's separate property by the husband, and his subsequent management and control of the same, all with her consent, do not show any intent on the part of the wife to make a gift of the property to the husband, or to change its *status* from separate to community property. The presumption in such a case appears to be that the property continues to be the separate property of the wife, and that the husband takes it in trust for his wife. Under such circumstances it devolves on the husband claiming a gift or change in the *status* of the property to show the same. This is the well-settled rule as to the *corpus* or principal (see *Stickney v. Stickney*, 131 U. S. 227, [9 Sup. Ct. 677]; *Denny v. Denny*, 123 Ind. 240, [23 N. E. 519]; *Chadbourn v. Williams*, 45 Minn. 294, [47 N. W. 812]; *Carter v. Becker*, 69 Kan. 524, [77 Pac. 264]; *Jones v. Davenport*, 44 N. J. Eq. 33, [13 Atl. 652]), a distinction being recognized by some of the authorities between the *corpus* or principal, and rents or profits thereof. But it is not essential in such a case for the husband to show any express agreement on the part of the wife. The gift or change in the *status* of the property may be shown by the very nature of the transaction or appear from the surrounding circumstances. (See *Black v. Black*, 30 N. J. Eq. 215; *Reed v. Reed*, 135 Ill. 482, [25 N. E. 1095]; *Schmidt v. Schmidt*, 56 Minn. 256,

[57 N. W. 453]; *Crumrine v. Crumrine*, 50 W. Va. 226, [88 Am. St. Rep. 859, 40 S. E. 341].) Mr. Perry says: "If a husband receive the capital fund of his wife's separate property there is no presumption that she intended to give or transfer it to him, but he is *prima facie* a trustee for her, and a gift from her to him will not be presumed without clear evidence, . . . but if the husband uses the property in his business, or for the support of his family, with her knowledge and assent, a gift may be inferred in the absence of a contrary agreement." (Perry on Trusts, p. 666.) The question in such cases is whether the evidence of the transaction and its surrounding circumstances clearly shows the intention of the wife to change the *status* of the property. There was evidence on the part of the husband in this case that some of this property was deposited by the wife immediately on its receipt to the credit of a running account kept by the husband in the local bank, an account to the credit of which he generally deposited all money coming into his hands, and upon which he drew in payment of all general expenses both of himself and wife, and for purposes of investment; that the great bulk of the property when received by her was immediately delivered to her husband and deposited by him with her knowledge to the credit of the same account; that this general fund, composed of the moneys thus mingled, was resorted to by the husband for the purchase in his own name of property, with her knowledge and consent; that it was generally understood between them without any express words to that effect that this was a common fund, to be used indiscriminately for the benefit of the community; that these conditions continued for some fifteen years without objection of any kind on the part of the wife, without any assertion of ownership by her of any part of the fund, and without any demand for any accounting. There were some minor circumstances detracting in some degree from the effect of all this, but they were not of sufficient force to preclude the trial court from inferring the intention of the wife to effect the change in the *status* of the property.

It is manifest, however, that the defendant's evidence was most material in the determination of the questions embraced in these findings. In fact, defendant's case rested almost entirely upon that evidence. The case, viewed in the most

favorable light to defendant, was a close one on the facts, and the lower court could not determine the issue in his favor unless it gave full faith and credit to his positive statements as to many matters discussed by him in his testimony, and as to which there was no other evidence in support of the findings. We say this much as a preliminary to the discussion of a ruling of the court admitting certain evidence, which under the peculiar circumstances detailed we consider prejudicially erroneous, if erroneous at all.

Defendant offered evidence in support of his character as to truth, honesty, and integrity, and over the objections of plaintiff that no attempt had been made to impeach the character of defendant, and that the evidence was incompetent, irrelevant, and immaterial, defendant was allowed to introduce the evidence of three witnesses to the effect that his reputation in the respects mentioned was good. As a matter of fact, no impeachment of the character of the defendant had been attempted, other than such impeachment as was involved in the production of evidence contradicting that of the defendant on some of the issues in the case in some minor respects. This evidence, really offered for the purpose of bolstering up the evidence of defendant, was, in our opinion, clearly inadmissible. Our statute provides: "Evidence of the good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such party or witness has been impeached, or unless the issue involves his character." (Code Civ. Proc., sec. 2053.) The issue in this case did not involve the character of defendant as a party (see *Van Horn v. Van Horn*, 5 Cal. App. 719, [91 Pac. 260]), and no attempt had been made to impeach his character. It is true that sections 2051 and 2052 of the Code of Civil Procedure provide that a witness can be impeached "by contradictory evidence, or by evidence that his general reputation for truth, honesty, or integrity is bad," or by evidence that he has been convicted of a felony, or has made inconsistent statements, but it does not follow that every impeachment of a witness thus enumerated is an impeachment of the *character* of the witness. The statute allows such evidence only when the *character* of the witness is impeached. Evidence that the general reputation of a witness for truth, honesty, and integrity is bad is, of course,

an impeachment of the character of the witness and may be met by rebuttal evidence to the contrary. There is much authority for the proposition that proof that the witness has been convicted of a felony is an assault upon his character justifying the admission in rebuttal of evidence of good reputation for truth, honesty, and integrity. It has so been held in this state. (*People v. Amanacus*, 50 Cal. 233.) Some courts have held that proof of declarations by the witness inconsistent with the testimony given by him constitutes such an assault upon his character, but this rule can by no means be held to be a generally accepted one. This court has held that proof to the effect that a witness had made overtures to the parties against whom he testified, to testify for them if he was paid for it, was such an attack, warranting evidence of good character in rebuttal. (*People v. Ah Fat*, 48 Cal. 63.) The court was, however, careful to state that if the testimony had been directed to mere proof of contradictory statements of the witness upon matters relevant to the issues being tried, the propriety of evidence of character to sustain the testimony of the witness "would have been, to say the least, questionable." In *People v. Bush*, 65 Cal. 129, [3 Pac. 590], a judgment was reversed because of the giving of an improper instruction, and the admission of evidence on the part of the prosecution in support of the character of a witness. It does not clearly appear in the opinion whether the impeachment of the witness was merely by evidence contradicting his testimony, or by proof of previous statements by him inconsistent with such testimony, which Mr. Justice Sharpstein said in his concurring opinion amounted to nothing beyond contradictory evidence. In any event, a majority of the court concurred in the view that under section 2053 of the Code of Civil Procedure evidence of the reputation of the witness to prove good character is admissible only when the character of the witness has been attacked by evidence that his reputation for truth, honesty, and integrity is bad, which to some extent is inconsistent with the two earlier cases. But so far as it forbids the introduction of such evidence where the only impeachment is one by contradictory evidence, it is not inconsistent with either, and is in full accord with nearly all the decisions in other states. Mr. Wigmore says that no court favoring admission under such circumstances

seems to have attempted a reasoned justification of its policy, and the great majority of jurisdictions agree in excluding such evidence. (See 2 Wigmore on Evidence, sec. 1109, and note, and, generally, secs. 1104 to 1108.) The distinction is clearly made by the cases between a mere assault upon the credit of a witness and an assault upon his character, and cases like the one under consideration are placed in the former class.

Learned counsel for defendant contend that for certain reasons this evidence was not prejudicial to plaintiff, but we see no force in their claim. It is said that such testimony was merely in harmony with the presumption that a witness speaks the truth (Code Civ. Proc., sec. 1847), and did not affect the result of the trial. The presumption that a witness speaks the truth is one that may be repelled by the manner in which he testifies and by the character of his testimony. (Code Civ. Proc., sec. 1847.) It is impossible for this court to say how much weight and influence this evidence of good reputation of the witness had upon the mind of the trial judge in determining the amount of credit to be given to his testimony. As has been said before, under the peculiar circumstances of this case, it "may have been all-powerful to that effect," and may have been the factor that turned the scale in favor of defendant upon the matters embraced in the findings we have discussed. Counsel for defendant evidently thought it was important evidence, or they would not have offered it, and the trial judge evidently considered it material, or he would not have admitted it. If the trial court was led to place more reliance upon the testimony of defendant by reason of such evidence of reputation than he would otherwise have done, and we cannot say that this was not the result, plaintiff was clearly prejudiced by the rulings admitting it. (See, generally, *Rulofson v. Billings*, 140 Cal. 460, [74 Pac. 35]; *Short v. Frink*, 151 Cal. 83, [90 Pac. 200], and cases there cited.) The fact that the defendant was called and examined as a witness by plaintiff we regard as of no importance in this connection. Bearing in mind the rule that the receipt of his wife's separate property by him being shown, which was a fact admitted by the pleadings, the burden was on him to show a change in its *status* from such separate property, it is clear that the admission of evidence

of good reputation to bolster up the testimony given by him in support of a claim of such change must be held to have been prejudicially erroneous.

The record shows that some of the money of the wife that came into the hands of the husband was clearly traced into certain property by evidence that was practically without conflict, and in this respect the findings of the court that the money could not be traced are not fully sustained by the evidence. If there was no change in the *status* of the wife's separate property, and a portion thereof was clearly traced, plaintiff was entitled to the relief asked for that portion, even if under the pleadings as they now stand it could not obtain relief as to the portion not traced, which is the claim of defendant. We do not, however, desire to be understood as conceding the correctness of this claim.

The objection that some of the findings involved in our discussion of the case are not attacked by specification of insufficiency is not well taken.

While some other questions are discussed by counsel, we deem it unnecessary to consider any of them on this appeal.

The judgment and order denying a new trial are reversed.

Shaw, J., and Sloss, J., concurred.

[Crim. No. 1381. In Bank.—February 7, 1908.]

THE PEOPLE, Respondent, v. EDWARD MANASSE,
Appellant.

CRIMINAL LAW—MURDER—SELF-DEFENSE—EVIDENCE—COTEMPORANEOUS SHOOTING AT ANOTHER.—Where the defendant charged with murder relied upon self-defense, and it appeared that he killed the deceased while lying in bed, saying when shooting, "You are the first man," and then immediately turned toward another person saying, "You are the next man," who unsuccessfully tried to seize the gun, and was shot in the back while running away, evidence of such cotemporaneous shooting was admissible and relevant, as tending to show an intention to kill them both, and to disprove the claim of self-defense. Such evidence was not rendered inadmissible merely because showing the commission of another crime than the one for which he was being tried.

- ID.—CORROBORATIVE EVIDENCE—SHIRTS OF SECOND PERSON SHOT AT.**—The shirts worn by the second person shot at, at the time of the shooting, were admissible in corroboration of his testimony, if they were in a condition to do so, and if not, their admission was harmless.
- ID.—SCOPE OF CROSS-EXAMINATION OF DEFENDANT.**—Although the cross-examination of the defendant must be limited to subjects testified to by him on direct examination, yet within the limits of such subjects, he may be asked any questions tending to shake the effect of his direct testimony.
- ID.—CROSS-EXAMINATION AS TO THREATS OF DECEASED—FAILURE TO COMMUNICATE THREATS—INFERENCE OF JURY.**—Where the defendant had testified on his direct examination that his wife had told him at various times that the deceased had made threats against his life, he was properly asked on cross-examination whether he had mentioned the threats to any one, to which he answered in the negative. Though he was not bound to tell any one of the threats, the jury might reasonably infer that a person going about in fear of his life, would be apt to mention the cause of his fears to some one.
- ID.—INSTRUCTION AS TO REASONABLE DOUBT—PARAPHRASE.**—Where the court had given the approved instruction as to reasonable doubt, the addition of the words, "a reasonable doubt is a doubt based upon reason, and growing out of the testimony and evidence in the case," is not an incorrect paraphrase of the definition, and does not import that the jury must give a reason for their doubt.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order denying a new trial.
E. C. Hart, Judge.

The facts are stated in the opinion of the court.

C. H. S. Bidwell, and Maurice E. Finn, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, for Respondent.

SLOSS, J.—The appellant, charged with the murder of one John K. Cook, was found guilty of murder of the first degree, and judgment of death was pronounced against him. He appeals from the judgment and from an order denying his motion for a new trial.

The fact of the killing was admitted, the appellant seeking to justify his act on the ground of self-defense. The finding of the jury against this plea is fully sustained by the evidence,

and the only points now made by the appellant are that the trial court erred in overruling two objections to offered testimony, and that its charge to the jury embodied an incorrect definition of "reasonable doubt."

1. It appeared that the defendant, with his wife and others, lived in what was known as "The Big House," at the junction of the American and Sacramento rivers. The deceased, Cook, lived near by in a scow moored in the American River. On the night of December 23, 1906, Cook, together with the defendant's wife and one Hopkins, were in Cook's room on the scow. Hopkins testified that the defendant came to the scow and asked his wife whether she was going up to the Big House with him. Upon her answering in the negative he left. After a few minutes he returned carrying a shotgun. Saying to Cook, "You are the first man," he fired the fatal shot at Cook, who was lying in his bed. He then said, "Hop" (meaning the witness Hopkins), "you are the next man." Hopkins, according to his testimony, then seized the barrel of the gun, and he and Manasse fought their way off the scow on to the bank, where the defendant got the gun away from Hopkins. Hopkins started to run and defendant shot him in the back. Hopkins identified an undershirt and an outershirt as the ones worn by him at the time of the shooting, and these garments were admitted in evidence over defendant's objection that they did not "tend to prove any of the issues in this case, to prove the guilt of the defendant as charged, or to prove the murder."

There is nothing in the record to show what the condition or appearance of the shirts was. If we assume, as is assumed by the appellant in his brief, that the appearance of the shirts indicated that their wearer had received a violent injury, the effect of admitting the shirts in evidence was to corroborate the testimony of Hopkins that the defendant had shot him. Such corroboration was proper, if the fact of such shooting was itself admissible. The attacks upon Cook and upon Hopkins were parts of a single transaction, and every element of defendant's conduct in that transaction could be shown to the jury for the purpose of illustrating his motive and intent in committing the act which was the basis of the charge against him,—i. e. the shooting of Cook. The fact that, after shooting Cook, the defendant attempted to and did shoot

Hopkins, had a direct tendency to support the theory that he had come to the scow with the intent of killing both Cook and Hopkins, and in like manner tended to disprove the claim that the killing of Cook was done in self-defense. The evidence of the shooting of Hopkins being relevant, it was not rendered inadmissible merely because it may also have shown the commission by defendant of a crime other than the one for which he was being tried. (*People v. Walters*, 98 Cal. 138, [32 Pac. 864]; *People v. Smith*, 106 Cal. 81, [39 Pac. 40]; *People v. Craig*, 111 Cal. 460, [44 Pac. 186]; *People v. Suesser*, 142 Cal. 363, [75 Pac. 1093]; *People v. Soeder*, 150 Cal. 12, 15, [87 Pac. 1017].)

If, then, the shirts were in such condition that their production supported Hopkins's testimony, they were properly admitted for the purpose of corroboration. If, on the other hand, their appearance did not strengthen this testimony—and, in view of the record, this may well be assumed—we cannot see how the admission of the garments could possibly have injured the appellant.

2. The defendant testified in his own behalf. On direct examination he stated that his wife had told him at various times that Cook had made threats against his life. On cross-examination he was asked, "Did you ever tell anybody about any threats that Cook had made against you?" An objection to this question as irrelevant, immaterial, and incompetent, and not proper cross-examination was overruled, and defendant excepted. The question was answered in the negative.

No doubt the ordinary rule is that mere silence is not a fact to be used against a party, unless the circumstances were such as to call for some statement from him. (*Wilkins v. Stidger*, 22 Cal. 231, [83 Am. Dec. 64].) But, on cross-examination, a considerable degree of latitude is permitted for the purpose of testing the memory, the bias, the accuracy, or the sincerity of the witness. It is true that, in the case of a defendant charged with crime, his cross-examination must be limited to subjects concerning which the witness testified on direct examination. But within the limits of such subjects the defendant who has offered himself as a witness may be asked any questions which have a tendency to shake the effect of his direct testimony. While the defendant was not bound to tell any one of threats made against him, a jury might

reasonably conclude that one going about in fear of his life would be likely to mention the cause of his fears to some one. That he made no such mention, though in no way conclusive, is a circumstance fairly to be considered in determining whether or not the alleged threats had been communicated to him as he stated, and is therefore a proper subject of cross-examination.

3. The court correctly instructed the jury regarding the presumption of innocence, and the obligation of the people to prove the guilt of the defendant beyond a reasonable doubt. In explaining the term "reasonable doubt," the court gave to the jury the well-known definition of Shaw, C. J., in *Commonwealth v. Webster*, 5 Cush. 320, [52 Am. Dec. 711]. In addition to this, the charge included the following language: "A reasonable doubt is a doubt based upon reason, and growing out of the testimony and evidence in the case." It is argued that the portion of the charge which is quoted is erroneous in that it requires the jury "to be able to assign a reason for their doubt." If the language of the court were fairly open to the interpretation so put upon it, there might be some basis for the criticism. There are cases holding it to be erroneous to charge that a reasonable doubt is a doubt "for having which the jury can give a reason." (*Cowan v. State*, 22 Neb. 519, [35 N. W. 405]; *Carr v. State*, 23 Neb. 749, [37 N. W. 630]; *Morgan v. State*, 48 Ohio St. 371, [27 N. E. 710]; *People v. Steubenvoll*, 62 Mich. 329, [28 N. W. 883].) Even these cases do not all go to the extent of deciding that the giving of such an instruction constitutes error sufficient, in and of itself, to justify a reversal. But that question is not presented here. The jury were not told that a reasonable doubt was a doubt for which they could give a reason, but that it was a doubt based upon reason. This is no more than a paraphrase, and a not incorrect one, of the term "reasonable doubt." An instruction substantially similar to the one under discussion was sustained by this court in *People v. White*, 116 Cal. 17, [47 Pac. 771], as it had been in *People v. Shaughnessy*, 110 Cal. 604, [43 Pac. 2]. The reversal of the judgment in *People v. Paulsell*, 115 Cal. 6, [46 Pac. 734], was based, not on the giving of this instruction, but on the refusal of the court to define "reasonable doubt" in the language used in the Webster case. It was held to be the right of a

defendant, where he requested it, to have this definition, so often approved by this court, given to the jury. Here the instruction refused in the Paulsell case was given, and the defendant has no ground of complaint because the court amplified it by the addition of a sentence which was neither incorrect nor misleading.

An examination of the entire record discloses no error.

The judgment and order are affirmed.

Angellotti, J., Shaw, J., McFarland, J., Lorigan, J., Henshaw, J., and Beatty, C. J., concurred.

[L. A. No. 2133. In Bank.—February 8, 1908.]

LOS ANGELES INTER-URBAN RAILWAY COMPANY,
Respondent, v. MANUEL MONTIJO et al., Appellants.

**ADVERSE POSSESSION — ACTUAL OCCUPANCY — CLAIM OF TITLE NOT
FOUNDED ON WRITTEN INSTRUMENT.**—Under sections 324 and 325 of the Code of Civil Procedure, a title to land by adverse possession, under a claim of title not founded upon a written instrument, judgment, or decree, can be acquired only to the land actually occupied, and the land so occupied is such land as has been protected by a substantial inclosure, or land which has been usually cultivated or improved.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order refusing a new trial. Charles Monroe, Judge.

The facts are stated in the opinion of the court.

William Crawford, for Appellants.

Bicknell, Gibson, Trask, Dunn & Crutcher, and Edward E. Bacon, for Respondent.

HENSHAW, J.—Plaintiff sued defendants to quiet title to certain land situated in the city of Los Angeles. After trial, the court gave judgment for plaintiff for the land in controversy, excepting a lot forty feet in width, title to which

was decreed to be in Manuel Montijo, and quieted Montijo's title to this lot against the plaintiff and against his co-defendants. From this judgment, and from the order denying their motion for a new trial, the defendants jointly appeal.

It is admitted that the land in controversy was originally a part of the Pueblo of Los Angeles, and, as such, was covered by the patent of the United States to the city of Los Angeles.

Plaintiff's title is a record title, derived by mesne conveyances from the city of Los Angeles. On behalf of defendants it was shown that one Duron resided upon the land from 1860 to 1881. The land was uninclosed and unimproved, excepting for a "tule shack" in which Duron lived. Such title as Duron acquired was, therefore, by adverse possession. In 1881 defendant Montijo paid Duron fifty dollars, and Duron surrendered possession to him. He had no deed from Duron; nothing more than a receipt for the money. Since that time Montijo has lived upon the land, still uninclosed and unimproved, except for a house built by Montijo upon the site of the tule shack. It may be conceded that Duron's claim by adverse possession ripened into a title before the amendment to section 325 of the Code of Civil Procedure requiring the payment of taxes. Montijo, his successor, is in the position of an occupant of land under a claim of title not founded upon a written instrument, judgment, or decree. His situation is that contemplated and provided for by section 324 of the Code of Civil Procedure, which declares that under such circumstances the land actually occupied, and no other, is deemed to have been held adversely. What land under such circumstances is deemed to be actually occupied is defined by the following section 325. It is land which has been protected by a substantial inclosure, or land which has been usually cultivated or improved. In the case at bar it is not shown that there was a substantial, or any, inclosure. It is not shown that there was any cultivation at all, or any improvement, saving that of the original tule shack, followed by the house which Montijo built upon its site. It is disclosed by the record that the court took evidence, under agreement of the parties, by visiting and viewing the premises, after which it decreed to Montijo a lot forty feet in width. It cannot be successfully argued that he was entitled to more.

All of the defendants, as has been stated, joined in the notice of appeal. So far as the respondent is concerned, it is sufficient to say that it does not appear that any of Montijo's co-defendants established any interest in the property adverse to it, and whatever interest they may have in the property decreed to Montijo adverse to him in no way concerns the respondent.

The judgment and order appealed from are therefore affirmed.

Lorigan, J., Angellotti, J., Shaw, J., Sloss, J., and McFarland, J., concurred.

[L. A. No. 1839. In Bank.—February 8, 1908.]

A. LESTER BEST, Respondent, v. A. W. WOHLFORD et al., Appellants.

TAXATION—DEED FOR IRRIGATION DISTRICT TAX—DESCRIPTION OF LAND—OBJECTION FOR UNCERTAINTY—EVIDENCE—IDENTIFICATION.—Where a tax-deed executed for non-payment of an irrigation district tax was objected to for uncertainty in the description of the land, the objection is sufficiently met by evidence showing that the description was in fact sufficient clearly to identify the land.

ID.—SALE OF WHOLE INTEREST—LEAST QUANTITY OBTAINABLE.—Where the tax-deed described the land assessed, and stated that the collector offered for sale the least quantity or smallest portion thereof to pay the assessments, costs, and charges, and that the grantee named was the bidder who was willing to take said least quantity and pay the same, and described said least quantity or smallest portion of the said land as the whole thereof again described and granted by the deed, the deed clearly shows that the whole of the land was the least quantity which any bidder was willing to take, and that the whole was in fact sold and intended to be conveyed by the deed.

ID.—CERTIFICATE SHOWING TIME FOR REDEMPTION—RECITAL IN DEED.—Where the law required the certificate of sale to show the time for redemption, and that the matters contained in the certificate must be recited in the deed, a recital in the deed showing that the certificate stated that unless the said real estate was redeemed within twelve months from the specified date of said sale the purchaser would be entitled to a deed thereof, such recital in the deed sufficiently shows that the certificate complied with the requirement of the statute in stating the time for redemption.

ID.—DOUBLE ASSESSMENT—BOND ISSUE—SPECIAL ASSESSMENT FOR EXPENSES—ASSESSMENT-ROLL—TAX-DEED—PRIMA FACIE EVIDENCE.

—The objection that the assessment-roll showed a double assessment, one for a bond issue and the other a special assessment for expenses, which were not stated separately in the notice of sale, certificate of sale, or deed, goes to matters not shown on the face of the tax-deed, and was not a good objection to its admission in evidence as *prima facie* evidence of all prior proceedings.

ID.—DESCRIPTION OF PROPERTY IN NOTICE OF SALE—DITTO MARKS—

ABBREVIATIONS—STATEMENT IN NOTICE.—Though the notice of sale is that to which the taxpayer is absolutely entitled, and is not concluded by the deed, yet the use therein of ditto marks and abbreviations which could not mislead and which are explained in the notice, do not affect its validity or the sufficiency of its compliance with the law.

ID.—AGGREGATE AMOUNT OF ASSESSMENTS—AGGREGATE OF TAXES, PER-

CENTAGE, AND COSTS.—The law does not require two assessments for the same year, on account of bond issue and for current expenses of the irrigation district, to be separately stated in the notice of sale, certificate of sale, or deed; and it is sufficient that the aggregate amount of the assessments and the aggregate amount of the taxes, percentage, and costs are correctly stated therein.

APPEAL from a judgment of the Superior Court of San Diego County. N. H. Conklin, Judge.

The facts are stated in the opinion of the court.

Cassius Carter, and Withington & Carter, for Appellants.

Luce, Sloan & Luce, for Respondent.

ANGELLOTTI, J.—This is an appeal by defendants from a judgment given in favor of plaintiff in an action of ejectment involving the title to lot four in block 178 of the Rancho Rincon del Diablo, in San Diego County, California.

Plaintiff was the owner of such property unless defendant Sadie B. Wohlford had succeeded to the title under a deed of conveyance, dated October 25, 1897, executed to her by E. J. Hatch, collector of the Escondido Irrigation District, in pursuance of a sale for the non-payment of irrigation district taxes for the year 1894.

Plaintiff having shown acquirement of the title to the property, defendants offered the tax-deed in evidence. Objection was made to its admission on various grounds, which

will hereafter be considered, and ruling on such objection was reserved by the court. The defendants then introducing further evidence, which was admissible for the purpose of showing, and which established, under the decision upon a former appeal (*Best v. Wohlford*, 144 Cal. 733, [78 Pac. 293]), that the description of land contained in the deed and assessment sufficiently identified the land, apparently rested. Plaintiff then offered evidence in rebuttal consisting of the assessment, the notice to the assessment payers, the delinquent list and notice of sale, and the certificate of tax-sale, for the purpose of showing defects in the proceedings, and objection by defendants being made thereto, the court reserved its ruling. Subsequently, in the absence of the parties and their counsel, the court sustained plaintiff's objection to the tax-deed, admitted the evidence offered by plaintiff in rebuttal, and gave judgment for plaintiff.

1. The grounds of objection to the tax-deed were substantially as follows: 1. That the deed designated no map or other data by which the identity of the land can be determined. 2. That the deed does not contain any description of the real estate conveyed, or, at least, is ambiguous and uncertain as to such description. 3. That the deed does not specify the time when the purchaser at the sale was entitled to a deed. 4. That it appears from the assessment-roll of the year 1894 on which the sale was made that there were two assessments, the regular assessment for the bond issue and a special assessment voted by the people of the district for expenses for the year, and these assessments are not separately set out either in the notice of sale, or in the certificate of sale or in the deed.

The first ground of objection was answered by the evidence showing that the description was in fact sufficient to clearly identify the land. (*Best v. Wohlford*, 144 Cal. 733, [78 Pac. 293]. See, also, *Baird v. Monroe*, 150 Cal. 560, [89 Pac. 352].)

The second ground of objection is based on the claim that the deed does not show what portion of or interest in the described premises was sold, the law providing that "the person who will take the least quantity of the land . . . and pay the assessments and costs due, including two dollars to the collector for the duplicate certificate of sale, is the pur-

chaser." (Act of March 7, 1887, sec. 27, Stats. 1887, p. 39.) A labored effort is made in this behalf to show that the deed purports to convey the "least quantity, or smallest portion of the said land," without designating what such least quantity or smallest portion is, thus leaving the deed without description of the exact property conveyed. Such, however, is not a fair or reasonable construction of the provisions of the deed. The deed, having theretofore given a description of the parcel of land, and stated that the collector offered for sale the least quantity or smallest portion thereof to pay the assessments, etc., and that P. J. Anshutz was the bidder who was willing to take the least quantity thereof and pay the assessments, etc., stated "That the said least quantity or smallest portion of the said land lying and being within the said Escondido Irrigation District, county and state aforesaid, described as follows, to-wit:

"Lot four (4) block one hundred seventy eight (178), 14.42 acres, Rancho Rincon del Diablo, was by said William Beckeler, collector aforesaid, struck off to the said P. J. Anshutz, who paid the full amount of said assessments, costs and charges, and therefore became the purchaser of the last described piece or parcel of land. That the said real estate last aforesaid was sold for assessments, and subject to redemption . . ."

The granting clause stated that the collector thereby granted, etc., "all that lot, piece or parcel of land so sold and hereinbefore and lastly described in this deed." To our minds this clearly shows that the whole of said lot 4 was the least quantity which any bidder was willing to take, and that such whole was in fact sold, and was intended to be conveyed by the deed.

The objection that the deed did not specify the time when the purchaser at the sale was entitled to a deed, evidently meant that it was defective in not showing that the certificate of sale contained a sufficient specification of the time when the purchaser would be so entitled, for there was in the law applicable no other requirement in this behalf. The law required the certificate to specify, among other things, the time when the purchaser will be entitled to a deed, (Act of March 7, 1887, sec. 27, Stats. 1887, p. 40), and also that the matters stated in the certificate must be recited in the deed.

(Sec. 30 of same act, and sec. 48 of Act of March 31, 1897, [Stats. 1897, p. 271].) The recital in the deed in this connection was: "And, whereas, said certificate stated that unless the said real estate was redeemed within twelve months from date of such sale, the purchaser thereof would be entitled to a deed thereof. That said certificate of sale bears date the 18th day of February, 1895, the day of said sale." This shows a plain statement in the certificate that the purchaser would be entitled to a deed at the expiration of twelve months from the eighteenth day of February, 1895, which sufficiently complied with the requirement of the statute in that behalf.

The fourth objection rested entirely on matters not shown on the face of the tax-deed, and was not a good objection to the introduction of the deed as *prima facie* evidence of the correctness of the prior proceedings. (Act of 1897, sec. 48, Stats. 1897, p. 271.)

It thus appears that none of the objections to the admission of the deed in evidence was good. It should have been received, and so received would have made a *prima facie* case for defendants.

2. It should be needless to say that the trial court having refused to admit any evidence in support of the tax title, it was error to allow plaintiff to introduce evidence in rebuttal for the purpose of showing that the tax-deed was invalid by reason of defects in the proceedings. In view of the ruling of the court on the tax-deed, there was no case for plaintiff to meet so far as the alleged tax-deed was concerned. Plaintiff, however, urges that the evidence so admitted shows that the attempted conveyance under the tax-sale was invalid, and no prejudice therefore could have accrued to defendants by reason of the exclusion of the deed, and, also, that if the judgment must be reversed on account of the ruling on the deed, this court should for the purposes of a new trial pass upon the objections presented by the evidence admitted in rebuttal. This we will proceed to do.

One of the two objections presented upon this evidence was that there was an insufficient description in the notice of sale of the property to be sold. It may be conceded that such notice was a thing to which the taxpayer was absolutely entitled, and that he could not be precluded from showing want of legal notice by the conclusive evidence provision as

to the effect of a deed. The property was assessed to one J. Mirandetti. The notice of sale, so far as is necessary to show the facts upon which this objection is based, was as follows:

| "Name and Description | Valuation. | Taxes |
|--|------------|-------------------|
| | | Perc'tg Costs. |
| | \$ | \$ |
| "Miller E S lot 2 b 170 R R del Diablo | | |
| "5 acres | 175 | 6 97 |
| "imp | 600 | 22 18 |
| "Mirandetti J lot 4 b 178 | " | |
| "14 42-100 acres | 505 | 19 17" |

The ditto marks, which are of universal usage and which could not be misunderstood, and the letter "b," which in the connection in which it appears could mean nothing but "block," show the property to be lot 4 in block 178 R. R. del Diablo. The notice, which is set forth in full in the transcript, describes many subdivisions as being of the "R. R. del Diablo," and makes it apparent that it constituted a large part of the irrigation district. We do not see how the owner of lot 4 in block 178 of the Rancho Rincon del Diablo could have failed to know therefrom exactly what property was referred to, and if this be true, the description was sufficient. In addition, the notice specified, immediately after the specification of the date upon which the sale would be made, that certain "abbreviations throughout the advertisement are used as follows: . . . 'R. R. del Diablo' for Rancho Rincon del Diablo." We know of no reason why the taxpayer was not required to observe this part of the notice, which left no room for conjecture or surmise as to the meaning of the abbreviation. The notice sufficiently complied with the law.

The only remaining objection to the validity of the proceedings was that the evidence introduced by plaintiff showed that the sale was made on two separate assessments and levies, and that the amounts of these are not separately stated in either notice of sale, certificate of sale or deed. The assessment-book of the district for the year 1894 had two columns, one being for the amount of assessment for the bond fund which the trustees were required to levy annually,

and the other being for the special assessment for the purpose of paying expenses of organization, including salaries of officers and employees. In these columns opposite the name of each taxpayer and the description and valuation of his property were placed the respective amounts due on each assessment, the entries in the case of Mirandetti being, in the bond assessment column \$14.04, and in the special assessment column \$3.74. In the notice of sale, as we have seen, there was no specification of these separate amounts, the statement being simply that the amount of taxes paid, percentage, and costs due was \$19.17, which was the aggregate of the \$14.04 and \$3.74, and the penalty for delinquency and accrued costs. The certificate of sale stated that the assessments were levied for the year 1894, the amount thereof being \$17.78 (the aggregate of the two assessments), and that the sale was to pay such assessments, amounting to \$17.78, and the further sum of \$3.39 costs, including two dollars for the duplicate certificate of sale. The deed was the same in this respect as the certificate.

We find nothing in the law applicable to these proceedings which required either notice of sale, certificate of sale, or deed to state separately the amount of each of these assessments. The special assessment provided for is one which the directors are required, if the same is voted by the electors, to levy at the time of the annual levy, and when so levied it is to be entered in the assessment-roll by the secretary of the board, "and collected at the same time and in the same manner as other assessments provided for herein." (Act of 1887, sec. 41, Stats. 1887, p. 44.) A single proceeding for the collection of the aggregate amount due on the various assessments shown by the assessment-book for the year was contemplated. The statute in regard to delinquent list and notice simply provided that the delinquent list must contain "the amount of the assessments and costs due opposite each name and description." A statement of the aggregate amount of all assessments, percentage for delinquency, and costs appears to be a literal compliance with this requirement. It has been held in regard to state and county taxes that, under a statute requiring the delinquent list to state "the amount of taxes, penalties, and costs due, opposite each name and description," it is not necessary to state separately the items

of taxes, penalties, and costs, a statement of the total amount being all that the law requires. (*Chapman v. Zoberlein*, 152 Cal. 216, [92 Pac. 188].) The certificate and deed were required to give simply "the amount and the year of the assessment, and the amount paid." This means the total assessment charge shown by the roll for the year. Both certificate and deed showed this amount to be \$17.78, the costs to be \$3.39, and the amount paid to be \$21.17. We think the statute was fully complied with in this matter.

The judgment is reversed and the cause remanded for a new trial.

Shaw, J., McFarland, J., Sloss, J., Lorigan, J., and Henshaw, J., concurred.

[L. A. No. 1943. Department Two.—February 10, 1908.]

G. C. CADY, Appellant, v. CITY OF SAN BERNARDINO,
and LYTLE CREEK POWER COMPANY, Respondents.

MUNICIPAL CORPORATIONS—PROPOSAL OF CITY COUNCIL FOR LIGHTING OF CITY—FLEXIBLE METHOD PROPER.—In performing the duty of a city council to provide the city with adequate lights, it is not required, in its proposal for bids, to fix the absolute number of lights required, which might be increased or diminished according as the population of the city might be increased or diminished; but it was proper to call for bids for a supply of lights of a designated character and candle-power, burning for a designated time, at so much per week or month for each light required by the city, which is the usual method adopted by municipal corporations.

ID.—REQUIREMENT OF CHECK FOR BENEFIT OF CITY ENDED BY CONTRACT—UNTENABLE SUIT BY TAXPAYER.—The object of the requirement of a ten-per-cent check accompanying a bid is for the benefit of the city, to avoid possible loss in the event that the successful bidder should refuse to enter into the contract; and where the contract is entered into the purpose of the requirement is at an end. A taxpayer cannot, after the contract is let under a proper method, maintain a suit to avoid it, either on account of the method employed or for the insufficiency of the required check for ten per cent of the bid, whatever objection he might have made for such insufficiency before the contract was let.

APPEAL from a judgment of the Superior Court of San Bernardino County. N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

Byron Waters, for Appellant.

The charter is the measure of the power of the city in making contracts. (*Argenti v. San Francisco*, 16 Cal. 255; *McCracken v. San Francisco*, 16 Cal. 591; *Zottman v. San Francisco*, 20 Cal. 97, 81 Am. Dec. 96; *Pimental v. San Francisco*, 21 Cal. 351; *French v. Teschemacher*, 24 Cal. 519; *People v. Coon*, 25 Cal. 649; *Herzo v. San Francisco*, 33 Cal. 134; *Nicholson Pavement Co. v. Painter*, 35 Cal. 699; *Ex parte Frank*, 52 Cal. 608, 28 Am. Rep. 642; *McCoy v. Briant*, 53 Cal. 247, 250; *Los Angeles Gas Co. v. Toberman*, 61 Cal. 199; *San Francisco Gas Light Co. v. Dunn*, 62 Cal. 580; *Gleason v. Spray*, 81 Cal. 217, 15 Am. St. Rep. 47, 22 Pac. 551; *Connor v. Southern California Motor R. Co.*, 101 Cal. 429, 35 Pac. 990; *Santa Cruz Rock Paving Co. v. Broderick*, 113 Cal. 628, 45 Pac. 863; *Frick v. Los Angeles*, 115 Cal. 512, 47 Pac. 250; *Times Publishing Co. v. Weatherby*, 139 Cal. 618, 73 Pac. 465; *Wichmann v. City of Placerville*, 147 Cal. 162, 81 Pac. 537; *Fountain v. City of Sacramento*, 1 Cal. App. 461, 82 Pac. 637; 1 Dillen on Municipal Corporations, secs. 21, 39, 449; 20 Am. & Eng. Ency. of Law, 2d ed., pp. 1159, 1168; Sutherland on Statutory Construction, sec. 454.)

Gregg & Surr, Ralph E. Swing, and Seward A. Simons, for Respondents.

Bids for water and lights are not required to be supplied under the express terms of the charter. (Const., art. XI, sec. 19; *Contra Costa Water Co. v. Breed*, 139 Cal. 432, 73 Pac. 189; *Denninger v. Recorder's Court*, 145 Cal. 632, 79 Pac. 360; *Harlem Gas Co. v. New York*, 33 N. Y. 309; *Tanner v. Town of Auburn*, 37 Wash. 38, 79 Pac. 494.) The mode of letting the contract for the city lighting was that usually employed by municipal corporations. (*State v. City of Phillipsburg*, 23 Mont. 44, 57 Pac. 408; *City of Baxter Springs v. Baxter Springs Light & Power Co.*, 64 Kan. 591, 68 Pac. 64; *Vincennes v. Citizens' Gas Light & Coke Co.*,

132 Ind. 114, 16 L. R. A. 485, 487, 31 N. E. 573; *Town of Colorado City v. Townsend*, 9 Colo. App. 249, 47 Pac. 663; *Altgelt v. San Antonio*, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 386; *Illinois Trust and Savings Bank v. Arkansas City*, 76 Fed. 271, 22 C. C. A. 171; *Detroit v. Circuit Judge*, 79 Mich. 389, 44 N. W. 622; *Attorney-General v. Detroit*, 26 Mich. 263, 270. The bid of ten per cent was for the benefit of the city and cannot be assailed after the contract is entered into and the bond for its performance given. (*Fletcher v. Prather*, 102 Cal. 413, 36 Pac. 658; *Rice v. Board of Trustees*, 107 Cal. 402.)

IIENSHAW, J.—This action was brought by plaintiff, as a taxpayer of the city of San Bernardino, to obtain a judgment against the defendants to the effect that a certain contract which had been entered into between them for the furnishing of illuminating light to the city of San Bernardino was void. A general demurrer to the complaint was sustained. Judgment followed for defendants and plaintiff appeals.

The city of San Bernardino called for proposals and bids for the furnishing of electric light to the city under section 140 of its charter. The section provides that no supplies, material, or other item of expenditure, for an amount exceeding three hundred dollars, except for personal services, shall be ordered or purchased by the mayor and common council, except after first advertising for sealed proposals, and awarding the contract to the lowest and best bidder, "which proposal must be accompanied by a certified check in an amount not less than ten per cent of the sum bid, which check must be forfeited to the city upon failure of the person, firm, or corporation bidding to enter into the contract awarded"; and a sufficient bond payable to the city, with two or more sureties, or a surety company bond, shall be required to secure a faithful performance of each contract awarded.

The propositions advanced by appellant against the contract, and upon which he asserts it to be absolutely void, are based upon what he conceives to be violations of this provision of the charter. Herein he contends that the contract is void because the call for bids did not specify any particular number

of lights, nor the candle-power thereof, which the city would require. In this respect, the bid of the Power Company, which is set forth at length in the complaint, shows that the company agreed to furnish such a number of lamps and lights as the city might require, describing the lamps and their candle-power at the price of \$4.49 for each lamp during each and every calendar month of the term. The call for the proposals declared that the bidder should furnish a statement of detail of the kind of light he proposes to furnish, the candle-power thereof and the price, for each light, per month, or otherwise.

It is next contended that the certified check with which the defendant power company accompanied its bid was only for fifty dollars, and that under the nature of the call for bids, no bidder could tell what amount should be named in the certified check accompanying the bid; and

Finally, it is urged that the provisions of the charter do not admit of the making of a contract containing the uncertain element as to the number of lamps, or lights, which the city might require; that, in other words, the call for bids should have prescribed the precise number of lights which the needs of the city exacted.

Upon all these points, as appellant declares, he relies on the familiar principle that the mode prescribed by the charter of the city is the only mode for the exercise of the power conferred, and that in the respects above enumerated there is a departure from that mode so flagrant as to render the contract void. Respondent makes answer that the charter provision in question has no applicability to a contract of a city for supplying it with gas, or other illuminating light, and that such has been held where the question was the furnishing of a municipality with water (*Contra Costa Water Co. v. Breed*, 139 Cal. 432, [73 Pac. 189]), that the same reasoning and rule under section 19 of article XI of the constitution, should apply to the furnishing of light (*Denninger v. Recorder's Court*, 145 Cal. 632, [79 Pac. 360]; *Harlem Gas Co. v. New York*, 33 N. Y. 309). But, without pausing to decide this question, and for the purposes of this case, taking the position which most strongly favors the appellant, we are still of the opinion that the trial court's ruling, sustaining the demurrer, was sound. The first objection, that the

council should have fixed the absolute number of lights required, upon which number alone proposals were to be received, is not sustained by reason or authority. It was the duty of the officers of the municipality to provide the city with adequate light. As the city should increase or decrease in population, more or fewer lights would be required. It would be absurd to exact that the city should advertise for and specify the number of lights, when during the life of the contract its need might be for five times the number, or, upon the other hand, when from calamity, or other cause, its necessities might be reduced to one fourth of the prescribed number. The simple, direct, and understandable method was that employed, to call for a supply of lights of designated character and candle-power, burning for a designated time, at so much per week or month. This was the method adopted, and is the general method (*State v. City of Phillipsburg*, 23 Mont. 16, [57 Pac. 405]; *Baxter Springs v. Baxter L. & P. Co.*, 64 Kan. 591, [68 Pac. 64]; *Vincennes v. Citizens' G. & L. Co.*, 132 Ind. 114, [31 N. E. 573], 16 L. R. A. 487; *Town of Colorado City v. Townsend*, 9 Colo. App. 249, [47 Pac. 663]; *Altgelt v. San Antonio*, 81 Tex. 436, [17 S. W. 75], 13 L. R. A. 386; *Illinois Trust and Savings Bank v. Arkansas City*, 76 Fed. 271, [22 C. C. A. 171].

The second contention of appellant that the bid of the power company was not accompanied by a certified check to the amount of ten per cent of the bid is equally untenable. In the first place, it would be difficult under the circumstances of this bid for the company to have determined with exactness what would have amounted to ten per cent and a court would be reluctant in such a case where a *bona fide* bid was presented to overthrow it upon such narrow ground. But, of more consequence still, is this consideration: the requirement that a certified check for ten per cent of the amount shall accompany the bid is one wholly for the benefit of the city to avoid possible loss in the event that the successful bidder should refuse to enter into the contract, thus, perhaps, entailing the necessity of re-advertising. It is conceivable that a taxpayer might have a grievance which would be heard in court to prevent the consideration by the officials of such a bid not so accompanied by the ten-per-cent certified check, but that grievance is certainly at an end when the bidder,

in good faith, and under an approved bond, has entered into the contract. Such is the condition here. The purpose of the requirement was at an end when the contract was entered into, and as this proceeding is brought after that fact and to avoid the very contract, the appellant is without standing upon this proposition.

The judgment appealed from is, therefore, affirmed.

Lorigan, J., and McFarland, J., concurred.

[L. A. No. 2065. Department Two.—February 10, 1908.]

In the Matter of the Estate of LUTELLUS DOOLITTLE, Deceased. WILLIAM S. DOOLITTLE and ALVIRA MARLING, Contestants of Will, Respondents, v. L. D. DAVENPORT, Proponent of Will, Appellant.

WILLS—CONTEST OF PROBATE—CONFLICTING EVIDENCE—SUPPORT OF FINDING.—The rule that a verdict or finding will not be disturbed upon appeal where there is a real and substantial conflict of evidence on the issue of facts involved applies to litigation over the validity of wills, as well as to any other kind of litigation. Upon a contest of the probate of a will, where, notwithstanding conflicting evidence, there was sufficient evidence and circumstances in proof to sustain the court in finding that when the will was made the deceased was of unsound mind and incapable of making a will, and that the proposed will was not his will, such finding cannot be disturbed.

ID.—ORDER DENYING NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE PROOF.—Where a new trial for newly discovered evidence is denied the order will be sustained, independently of the question of laches, where the affidavits are of little importance or are merely cumulative.

APPEAL from an order of the Superior Court of Los Angeles County denying a new trial. Curtis D. Wilbur, Judge.

The facts are stated in the opinion of the court.

Gavin W. Craig, and Frank C. Vaughn, for Appellant.

Frank James, for Respondents.

McFARLAND, J.—This appeal arises out of a contest over the probate of the alleged will of Lutellus Doolittle, deceased. The proponent is L. D. Davenport, who is the main beneficiary in the will and named therein as executor. The contestants are a brother and sister of the deceased. The case was tried without a jury, and the court found that at the time of the making of the alleged will the deceased was of unsound mind and incapable, from such unsoundness of mind, of making a will, and that the alleged will is not his will; and judgment was entered denying the probate.

The proponent made a motion for a new trial, which was denied, and from the order denying the motion he appeals.

Appellant makes two points for a reversal, 1. That the evidence was not sufficient to justify the finding that the deceased was not of sound mind, and, 2. That a new trial should be granted on account of newly discovered evidence.

1. This court has a number of times set aside verdicts upsetting wills in cases where there was ample proof of the validity of the will in question, and what was claimed to be conflicting evidence was mere pretense and without material and substantial value. But, of course, the rule that a verdict or finding will not be disturbed where there is a real and substantial conflict of evidence on the issue of fact involved, applies to litigation over the validity of wills as well as any other kind of litigation; and, in our opinion, this rule as to conflicting evidence applies to the case at bar and to the finding that the deceased was of unsound mind and incapable of making a will at the time of the alleged making of the will here in question. We will not notice in much detail the evidence on which the finding is based, but will notice only a few leading circumstances. The document in question was signed by the deceased, by making his mark, at the hospital of the National Soldiers' Home of Los Angeles County, about ten o'clock A. M. of February 26, 1905. He had been in the hospital several days suffering from an attack of acute pneumonia, which caused his death. He was in an exceedingly weak and feeble condition physically. One of appellant's witnesses says: "I saw Mr. Doolittle make his mark. He tried to write his name but could not do it. He was weak and could not sit up straight in bed." The evidence shows that he was evidently about as weak and feeble physically

as a man can well be and still live. He was dying at the time of the alleged making of the will. Dr. Parker, a subscribing witness, and a witness for appellant at the trial, speaking of the condition of the deceased at the time of the making of the will, said: "He was a dying man, of course." And he died within an hour thereafter. Of course, a man may be extremely weak and feeble physically, and may be in a dying condition, and yet retain his mental faculties and will power to such an extent as to enable him to make a valid will; but such a feeble and dying condition is entitled to consideration in determining his mental capacity, and is of marked significance when there is also evidence tending directly to show his feeble mental condition. There is evidence that he was, part of the time at least, in a state of dumbness and deep stupor. He died in a cot in the hospital surrounded by other cots in close proximity occupied by other patients. About seven o'clock in the morning, an hour or two before the making of the will, one of the attendants at the hospital brought the deceased his breakfast and spoke to him, but could not get any answer. "He appeared to be asleep and drowsy." He did not eat anything. Afterwards at about 10:30 o'clock he again asked the deceased if he wanted to eat anything, but could get no answer. Dr. Parker, appellant's witness, speaking of the time of the making of the will, says: "He was very sick, slightly drowsy, but *when aroused* and spoken to he answered clearly and rationally. . . . He could speak but with some difficulty." There was other evidence pointing in the same direction. Moreover, the will was written by the appellant and there was a sharp conflict of evidence as to whether the deceased was a moving party in having the will made, whether he dictated it to the appellant or whether the latter first read the various paragraphs and then asked the deceased if it was what he wanted. When appellant came to the cot of the deceased to write the will, he asked one Griffith to be a subscribing witness, and to take notice "of what was going on there that morning." The witness said "my bed was right there and I sat down and listened to the whole business." When asked "if Mr. Doolittle gave the substance of the will to Davenport as he wrote it," he answered, "Well, no, I could not say that." Again he said, "I did not hear Mr. Doolittle say anything that

morning that I remember of besides asking Mr. Davenport to read one part of the will over again. I didn't hear him give any directions at all as to whom he wished to dispose of his property." The witness Wallingford testified that he was present when the will was drawn. He testified that appellant "would read a little ways and ask him if that was satisfactory to him, and he would say, yes, it is right."

Q. "Did it happen like this, that Davenport would read a little and ask Doolittle if that was satisfactory to him, and Doolittle would say yes?"

A. "Well, that was just the way it was."

The appellant testified that on the morning when the will was made he went to the ward where the deceased was, at the request of a Dr. Hasset, who had informed him that Doolittle wanted to settle up his affairs. He testified that when he went to the cot occupied by Doolittle he said "Good morning," and Doolittle replied, "They say I can't get well. Do you think so, Mr. Davenport?" Davenport replied that he was afraid it was so. Doolittle, according to Davenport's testimony, then said that he wanted his affairs settled, saying nothing, however, about a will, and Davenport told him it would be necessary for him to make a written will. But another witness, Barth, testified that upon that morning he saw Davenport coming into the ward; that he went to Doolittle's cot and said, "Hello, Dooley, you remember me?" There was other evidence, some of which is hereinbefore referred to, tending to show that the appellant, and not Doolittle, was the moving party in having the will made. Indeed, it is highly probable that if the deceased had not been "roused and spoken to," and the making of the will pressed upon him, it never would have been made. The fact is significant—outside of the question of undue influence, which is not raised here—for, if the purpose of making the will had originated with the deceased, and he had, of his own motion, carried that purpose into effect, those facts would have been important evidence to the point that, notwithstanding his feeble and dying condition, he still had the will power and the mental capacity to make the will. But if he was merely the passive, half-conscious assenter to the dictation of another person, that fact would be consistent with and corroborative of the want of testamentary capacity found by the court. There are other

facts and circumstances urged by respondents in support of the judgment which we will not discuss. The evidence and circumstances referred to are sufficient to support the finding excepted to; and there is no warrant for us to hold that, notwithstanding that evidence and the peculiar circumstances surrounding the alleged making of the will, the court *should have found the other way*.

2. As to the ground of newly discovered evidence, it is sufficient to say that, waiving the question of laches, the affidavits offered are either of little importance, or are merely cumulative.

The order appealed from is affirmed.

Henshaw, J., and Lorigan, J., concurred.

[L. A. No. 1877. In Bank.—February 10, 1908.]

ADELAIDE M. BANNING et al., Respondents, v. W. H. KREITER et. al., Appellants.

ACTION TO RECOVER STRIP OF LAND USED AS ALLEY-WAY—LICENSE—FINDINGS—PLEA OF EASEMENT AND ESTOPPEL—FAILURE TO FIND—REVERSIBLE ERROR.—In an action to recover a strip of land which plaintiffs claimed has been used as an alley-way by mere revocable license, but in which the defendants claimed an easement, and supported the claim by a plea of estoppel resting upon the authorized representations of plaintiffs' agents in selling the property abutting thereon to the defendants, where the court found for the plaintiffs, its failure to find upon the defendants' plea of estoppel where there is substantial evidence to support it, is reversible error, justifying a new trial.

ID.—RESERVATION OF ALLEY-WAY FOR BENEFIT OF DAUGHTERS—AUTHORIZED REPRESENTATION TO ABUTTING PURCHASERS—SUPPORT OF ESTOPPEL.—Where a plaintiff as owner had reserved an alley-way for her daughters, and had authorized her husband to employ real estate agents to sell lots for her, who, with the husband's consent, sold lots abutting thereon, stating the reservation so made, and that the purchasers would have the benefit of that alley-way, and in consideration thereof paid an increased price therefor, the facts show an intended abandonment of the seller's existing right in the alley-way, which will support an estoppel in favor of the purchasers of the abutting property relying thereon.

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ID.—EXCEPTION TO GENERAL RULE AS TO REPRESENTATIONS RAISING AN ESTOPPEL.—When the statement relates to an intended abandonment of an existing right, and is made to influence others, and they have been influenced by it, the case is a recognized exception to the general rule that a representation to constitute an estoppel must relate to an existing fact and not to a matter of opinion, or promise of future performance; and so, when purchases are made upon representations by the seller that abutting property owned by him will be maintained as a public or private way for the benefit of the purchasers, there is an expression of an intended abandonment of a seller's existing right which will support an estoppel, if the purchasers have relied upon it.

APPEAL from an order of the Superior Court of Los Angeles County denying a new trial. Waldo M. York, Judge.

The facts are stated in the opinion of the court.

Works, Lee & Works, for Appellants.

McNutt & Hannon, and George H. Smith, for Respondents.

HENSHAW, J.—This is an action to recover possession of a tract of land in the city of Los Angeles. The controversy arises over a strip twelve and a half feet in width, extending north from Requena Street a distance of ninety-four feet. This strip had been used under a claim of right by defendants as an alley-way to their property, which abutted upon it. Defendants contended for an easement over the strip and for a right-so to use it as an alley-way. This right defendant Hanniman supports by a plea in estoppel, and this estoppel in turn arises from the declarations of the authorized agents of plaintiffs in selling the property. The court found for plaintiffs, but failed to find upon defendants' plea in estoppel, and this error is here urged upon appeal from the order denying the motion for a new trial. The omission of the court is prejudicial error, if there be any substantial evidence to support the plea, and for a determination of this a consideration of the facts becomes necessary.

In 1881, Mrs. Banning, through her husband, William Banning, employed a firm of real estate agents to sell certain city lots for her. Mrs. Banning took no personal part in the matter, gave no instructions to the real estate agents, but intrusted the whole matter to her husband. She testifies that

whatever he did, he did with authority. Mr. Banning is dead. Mrs. Banning testifies that, because of the fact that her daughters owned a lot lying to the rear of this twelve-and-a-half-foot strip, it was decided between herself and her husband to reserve this twelve-and-a-half-foot strip as a means of ingress and egress to the daughters' land, but that the reservation was made wholly for her own purposes. One of the purchasers, Hanniman, testifies that he went to the real estate firm of Rowan & Dobinson, who were the agents for the sale of these lots, to purchase lots 76 and 77, each with a 25-foot frontage; that he was told by the real estate agents that the estate (Mrs. Banning) had reserved one half of lot 77 as an alley-way, and that by purchasing lot 76 and half of lot 77 he would have a frontage on this alley-way, better light for his building, etc., and that he would have the right to go in and out the alley. He then purchased the lot and the half lot, paying one hundred and fifty dollars extra, over and above the regular asking price, on account of the alley-way. Mrs. Banning has no recollection of receiving this extra price, and Mr. Dobinson of the real estate firm has no recollection of having exacted it, but nothing disputes the positive statement of Mr. Hanniman that it was exacted, and that he did so pay it.

The turning point of the matter, however, is to be found in the testimony of the selling agent and the interpretation which is to be given to that testimony. So far as it is pertinent to this matter, it is here quoted. He says that he drew the pencil line on the map marking off and reserving the disputed twelve and a half feet. The statement made to Mr. Hanniman, with the map before them and the pencil mark showing the reservation, was "to the effect that the estate had decided to reserve the west half of that lot, in order to give an entrance in the rear of the property owned by the minors, and that therefore he would have the benefit of that alley. . . . We had no conversation with Mrs. Banning at any time. All our business was done with Mr. Banning, whom we regarded as her agent. . . . Of course, we, as agents, should not have dreamed of reserving any portion of the lots offered for sale without the consent of the owner, or whom we regarded as the owner. And the reservation was made, with Mr. Banning's consent, of this twelve and a half

feet for the purposes of an alley. . . . With reference to the reservation of this alley, the same representations were made (to other purchasers) exactly as in the case of Mr. Hanniman."

It is settled that while, generally, a representation to raise an estoppel, where the negotiations have ended in a contract, must relate to an existing fact and not be a mere expression of opinion or a promise of future performance, a well recognized exception to the rule is presented where the statement relates to an intended abandonment of an existing right and is made to influence others, and they have been influenced by it (*Union Mutual Life Ins. Co. v. Mowry*, 96 U. S. 544); and so, where purchases are made upon representations by the seller that abutting property owned by him will be maintained either as a public street or private way for the benefit of the purchaser, here is the expression of an intended abandonment of a seller's existing right which will support an estoppel, if the purchaser has relied upon it. (*Prescott v. Edwards*, 117 Cal. 303, [59 Am. St. Rep. 186, 49 Pac. 178].)

Besides the facts above set forth, and besides the additional circumstance that during all these years the appellants have used this passage-way as an alley under what they conceived to be their right, there are further matters in evidence which, while not bearing directly upon the question of estoppel, have a significance as tending to show what was in the minds of the parties at the time of the contract. Thus, after the deed, it is in testimony that Mr. Banning congratulated one of the purchasers upon having made an advantageous bargain, since his lot fronted upon the alley. This, of course, is but a statement or representation made after the fact, but it is of value as showing what Mr. Banning's conception of the matter was at the time, which conception he undoubtedly conveyed to his agents. Moreover, the city has treated this *cul de sac* as a public way and has levied no assessments upon it. Mrs. Banning, who testifies to her ignorance of many of these matters, is chargeable with this knowledge, and with the knowledge came the duty, if she regarded it as her private property, to see that it bore its share of the burden of taxation.

Coming to its ultimate analysis, the controversy resolves itself to this: What is the meaning of the language employed

by the agent in dealing with the purchaser? By plaintiffs it is contended that the language meant no more than what Mrs. Banning testified was her understanding of the matter; that she designed to reserve this strip for her own purposes and for such a length of time as she saw fit, as a mode of ingress and egress to the property of her daughters in the rear; that the purchasers of her lots could, and did, use this property under license during such time as she chose to allow the alley-way to remain open, but their right to use it was under a mere license, revocable at the owner's pleasure; that when Mr. Dobinson said, as above quoted, that the estate had decided to reserve the west half of the lot in order to give an entrance to the rear property owned by the minors, and that, therefore, the purchaser would have the benefit of the alley, his language meant no more than as above stated, namely, that Mrs. Banning was reserving for her own purposes a private way, and so long as she chose to reserve it the purchasers would have the benefit of it. Upon the other hand, what is the fair meaning of the language which the real estate agent testifies that he used, and what is the idea which would naturally be conveyed by it. It seems quite plain that it is not the construction for which respondent contends. If such had been its meaning one would expect that somewhere in the agent's testimony there would have been at least a suggestion that he regarded the twelve and a half feet as a temporary private way of the seller, to be closed at her pleasure. Yet no intimation of this kind is anywhere found in his testimony. The natural interpretation of his language conveys the idea that because Mrs. Banning's daughters owned property to the rear of this strip, she had decided to reserve the strip as an alley-way; that the reason which prompted her to this reservation was the fact that her daughters owned property in the rear, but that the effect of the reservation would be to give the purchasers of adjoining lots a perpetual easement over this open strip. Thus it is apparent that there is evidence, substantial and strong, to support the plea of estoppel, and it was, therefore, error for the court to fail to find upon it. This court is, of course, without ability to make a finding on the matter, and it follows, therefore, that the order appealed from must be reversed and the cause remanded for a new trial.

Angellotti, J., Shaw, J., Lorigan, J., McFarland, J., and Beatty, C. J., concurred.

Rehearing denied.

[S. F. No. 4955. In Bank.—February 10, 1908.]

FRED WOODWORTH, Petitioner, v. SUPERIOR COURT
OF THE COUNTY OF MARIN, Respondent.

PROHIBITION—ACTION TO PREVENT ISSUANCE OF CERTIFICATE OF PURCHASE OF STATE LAND—JURISDICTION.—The state may, under certain circumstances, maintain an action to prevent the issuance of a certificate of purchase of state lands, of which the superior court would have jurisdiction. Consequently, prohibition will not lie to prevent the prosecution of such an action, notwithstanding the complaint therein may be defective for failure to state a cause of action.

APPLICATION for a Writ of Prohibition directed to the Superior Court of Marin County. Thos. J. Lennon, Judge.

The facts are stated in the opinion of the court.

Fred Woodworth, *in pro. per.*, for Petitioner.

THE COURT.—It cannot be held that the state may not, under some circumstances, maintain an action to prevent the issuance of a certificate of purchase of state land, which, as we read the pleadings, is practically the character of the action, the prosecution of which is here sought to be enjoined by prohibition. If this be so, we cannot say that the superior court has no *jurisdiction* of the action. The objection made by petitioner really is that the complaint does not state facts sufficient to constitute a cause of action. It may be that the complaint here does not state facts sufficient to constitute a cause of action, but that is a matter for the trial court to determine in the exercise of its jurisdiction, and prohibition will not lie.

Application denied.

[L. A. No. 1989. In Bank.—February 10, 1908.]

In the Matter of the Estate of EDSON G. WOODARD,
Deceased.

ESTATE OF DECEASED PERSON—COLLATERAL INHERITANCE TAX DETERMINED BY ACT IN FORCE AT DEATH.—The amount of a collateral inheritance tax to be paid by those succeeding to the estate of a deceased person is to be determined by the statute in force at the time of the death of the deceased.

APPEAL from an order of the Superior Court of San Diego County fixing a collateral inheritance tax, and from an order distributing the estate of a deceased person. N. H. Conklin, Judge.

The facts are stated in the opinion of the court.

Cassius Carter, and Albert Schoonover, for Appellant.

THE COURT.—This is an appeal by George F. Schwartz, as county treasurer of the county of San Diego, from two orders of the superior court, one settling the final account of the administrator with the will annexed of the estate of deceased, and the other decreeing final distribution. No brief on behalf of respondent has been filed. Under the will of deceased, his brother was entitled to the whole estate, and the sole question presented by counsel for the appellant is, to what act of the legislature must we look to determine the amount of collateral inheritance tax to be paid by those succeeding to the estate? That question is answered by two decisions of this court (*Estate of Stanford*, 126 Cal. 112, [54 Pac. 259, 58 Pac. 462]; *Trippet v. State*, 149 Cal. 526, [86 Pac. 1084]). It is the act in force at the time of the death of the deceased that must govern. At the time of the death of the deceased, the act in force was that of March 20, 1903 (Stats. 1903, p. 268), under the provision of which the tax upon property passing to a brother was five per cent. The lower court erroneously proceeded upon the theory that the act of 1905 (Stats. 1905, p. 341), which fixed such tax at one and one-half per cent, was applicable.

The orders appealed from are reversed and the cause remanded.

[L. A. No. 1945. In Bank.—February 10, 1908.]

CITY OF ESCONDIDO, Appellant, v. A. W. WOHLFORD,
Respondent.

TAXATION — MUNICIPAL CORPORATIONS — ASSESSMENT-BOOK — DESIGNATION OF FISCAL YEAR.—Where the assessment-book of a municipal corporation, the fiscal year of which commenced on the first day of January, clearly shows, by the affidavits of the city assessor and city clerk contained therein at the end of the list of property, and which were required by the provisions of the Municipal Corporation Act, that the book was in fact the assessment-roll of the city for the year 1904, and could be nothing else, the assessments contained therein are not invalidated by the erroneous recital printed on each double page of the book that it was the assessment-book of the property of the city for the year 1904-1905.

ID.—CITY OF ESCONDIDO — TAXING SYSTEM — CONSTRUCTION OF ORDINANCE—ADOPTION OF PROVISIONS OF POLITICAL CODE.—The ordinance of the city of Escondido, establishing a system for the assessment, levy, and collection of city taxes, and in terms providing that the provisions of the Political Code were adopted as the law “for assessing, levying and collecting city taxes, except as the time, manner, mode and persons are provided for,” in the Municipal Corporation Act, did not adopt, as a part of that system, any section of the Political Code the subject-matter of which was covered by the provisions of the Municipal Corporation Act applicable to cities or towns of the sixth class.

ID.—AUTHENTICATION OF ASSESSMENT-ROLL.—The matter of the certification and authentication of the assessment-roll in cities of the sixth class is fully covered by the provisions of sections 872, 877, and 878 of the Municipal Corporation Act, and, consequently, under such ordinance of the city of Escondido, section 3732 of the Political Code, requiring the assessment-roll of state and county taxes to be authenticated by the affidavit of the county auditor, is inapplicable to its taxing system, and a failure to conform to its requirements will not prevent the city from enforcing its taxes.

APPEAL from a judgment of the Superior Court of San Diego County, and from an order refusing a new trial. N. H. Conklin, Judge.

The facts are stated in the opinion of the court.

F. P. Willard, for Appellant.

William H. Francis, for Respondent.

ANGELLOTTI, J.—This is an action by the city of Escondido, a municipal corporation of the sixth class, to recover from defendant the sum of \$11.55 city taxes for the year 1904, with penalties and costs. Judgment went for defendant, and plaintiff appeals from such judgment and from an order denying its motion for a new trial.

By ordinance, the fiscal year for that city is made to commence on the first day of January. The complaint alleged the due making of an assessment-list for the year 1904, containing the assessment sued on in this action, and this allegation was denied in the answer. Upon the trial, plaintiff offered the assessment-book in evidence for the purpose of showing a valid assessment and establishing *prima facie* its right to recover the tax thereon charged against defendant. (*Modoc Co. v. Churchill*, 75 Cal. 172, [16 Pac. 771]; *San Gabriel Co. v. Witmer Co.*, 96 Cal. 636, [29 Pac. 500, 31 Pac. 588].) The trial court sustained an objection to the offered evidence. Plaintiff was thus precluded from showing a valid assessment. No such assessment being shown, the court directed judgment for defendant. The ruling of the court in sustaining the objection to the assessment-book is the only matter presented for our consideration on this appeal.

The assessment-book offered in evidence had printed upon each double page the words: "Assessment Book of the Property of the city of Escondido for the year 1904-1905." One of the grounds of objection was, in effect, that this was not the assessment of property alleged in the complaint, which was one for the year 1904. But the book in other respects sufficiently showed that it was the assessment-list for the year 1904. As we have seen, under the laws relating to city assessments and taxes in the city of Escondido, there was no such year as "1904-1905," and there could be no assessment-book for any such year. The affidavit of the city assessor and the certificate or affidavit of the city clerk contained in said book at the end of the list of property, which were required by provisions of the Municipal Corporation Act (Secs. 872 and 877, [Stats. 1883, pp. 274, 275]), clearly show that the book was in fact the assessment-roll of the city for the year 1904, and could be nothing else. Under these circumstances, the printed statement at the head of each double page that it was the book for the year 1904-1905, which, in

view of the law applicable, was meaningless, cannot be held to render it in the slightest degree uncertain that the book was the assessment-roll for the year 1904.

The other ground of objection to the roll was that it was not authenticated by the affidavit provided for by section 3732 of the Political Code. That section, relating to the duties of the county auditor in the matter of state and county taxes, provides: "On or before the second Monday in October he must deliver the corrected assessment-book to the tax-collector, with an affidavit attached thereto, and by him subscribed, as follows: 'I, _____, auditor of the county of _____, do swear that I received the assessment-book of the taxable property from the clerk of the board of supervisors, with his affidavit thereto affixed, and that I have corrected it and made it to conform to the requirements of the state board of equalization; that I have reckoned the respective sums due as taxes, and have added up the columns of valuation, taxes, and acreage, as required by law.'"

It has been held that in the case of assessments for state and county taxes such an affidavit is essential to the enforcement of the tax (*Miller v. County of Kern*, 137 Cal. 521, [70 Pac. 549]). We are of the opinion, however, that the section is not applicable here. The ordinance of the board of trustees of the city of Escondido providing a system for the assessment, levy, and collection of city taxes did not purport to adopt as a part of that system any section of the Political Code the subject-matter of which was covered by the provisions of the Municipal Corporation Act applicable to cities or towns of the sixth class. That act in terms provides that the system to be adopted must not be inconsistent with the provisions of such act (sec. 871). The ordinance of the board in terms provided that said provisions of the Political Code are adopted as the law "for assessing, levying and collecting city taxes, *except as the time, manner, mode, and persons are provided for*" in said act. The matter of certification and authentication of the assessment-roll appears to be a matter that is fully covered by the provisions of said Municipal Corporation Act. The assessor is thereby expressly required to verify the assessment-list by his oath, and deliver the same to the city clerk (Sec. 877). The city clerk, discharging the duties corresponding to those of both the clerk of the board of supervisors and

the county auditor in the matter of state and county taxes, is expressly required after equalization and correction of the list by the trustees, to certify it, and, after the tax levy, to apportion the taxes thereon, and deliver it to the marshal for collection. (Secs. 872, 878.) There is no provision for any other certificate or affidavit by the clerk. These provisions cover the whole matter of the authentication of the roll, and in view of the language of the ordinance it is not to be presumed that the board intended to adopt as a part of their system a section of the Political Code as to further authentication, especially one which is so entirely inapplicable to the conditions existing in the matter of city assessments in cities of the sixth class. The principal matter covered by the affidavit provided for in that section is the matter of the correction by the county auditor of the roll to make the assessments therein correspond to such changes as have been made by the state board of equalization, the declaration under oath of such officer that he has corrected the roll to make it correspond with such change. Such a declaration as to the city assessment-roll would be meaningless. The state board of equalization has no power to order any change in such roll, and there are no corrections to be made therein except those ordered by the board of trustees sitting as a board of equalization, which changes are covered by the certificate of the clerk provided for by the Municipal Corporation Act. To require the clerk to attach an affidavit stating that he had received the roll from himself, and had then corrected it, when he had no power to further correct it, and had made it conform to the requirements of the state board of equalization, a body having no power at all in the matter, would be most absurd. Yet this would be the consequence of the contention of defendant, for the section of the code requires an affidavit in the words therein set forth. It is much more reasonable to construe the ordinance as not contemplating the adoption of any section of the Political Code relating to the authentication of the roll by an officer or officers, and as leaving that particular matter to be governed solely by the provisions of the Municipal Corporation Act in that behalf. We regard the subsequent provision in the ordinance that certain enumerated sections of the Political Code "shall not be held applicable" as of very little force in

determining the proper construction of the ordinance. The previous provision excepting all such matters as are covered by the Municipal Corporation Act is clear and explicit, and its effect is not impaired by the language used in the subsequent provision.

No other ground of objection to the assessment-roll is urged, and no reason appears to us why the roll should not have been admitted in evidence.

The judgment and order denying a new trial are reversed.

Shaw, J., McFarland, J., Henshaw, J., Sloss, J., and Lorigan, J., concurred.

[L. A. No. 1907. Department One.—February 11, 1908.]

GEORGE H. WILLIAMS, Appellant, v. CITY OF SAN PEDRO, SOUTHERN PACIFIC RAILROAD COMPANY, E. K. WOOD LUMBER COMPANY et al., Respondents.

TIDE-LANDS—SALE BY STATE.—All tide-lands within any incorporated city or town other than San Francisco or Oakland are excluded from the operation of the provisions of law authorizing the sale of lands.

ID.—TIDE-LANDS IN SAN PEDRO—VOID CERTIFICATE OF PURCHASE—ACTION BY HOLDER TO QUIET TITLE—COLLATERAL ATTACK.—The provisions of section 3488 of the Political Code withheld from the state officers all authority to grant or sell tide-lands within the city of San Pedro; and a certificate of purchase for the same is void and may be collaterally attacked in an action by the holder of the certificate to quiet his title as against the city and other defendants, though they do not connect themselves with the title of the state.

ID.—POSSESSION OF TIDE-LANDS BY DEFENDANTS IMMATERIAL.—In an action to quiet title to tide-lands, the plaintiff cannot prevail unless he shows title in himself; and the defendants, though not in possession of the lands, may effectually defend by showing that the certificate of purchase under which plaintiff claims title, is without authority of law and void, where plaintiff shows no possession of the lands in himself. [Shaw, J., non-concurring.]

ID.—CERTIFICATE OF PURCHASE NOT VOID ON ITS FACE—PRIMA FACIE EVIDENCE—FACTS ALIUNDE SHOWING INVALIDITY.—If a certificate of purchase of tide-lands is not void on its face, it is only *prima facie* evidence of title; and the defendants in an action to quiet title,

though claiming no interest in the lands, may, under denial of plaintiff's title, show by evidence *aliunde* that the lands described in it are in fact tide-lands not subject to sale, and that the certificate of purchase is therefore void. [Shaw, J., non-concurring.]

ID.—ADMISSION OF FACTS BY PLAINTIFF—OBJECTION TO CERTIFICATE OF PURCHASE PROPERLY SUSTAINED.—Where plaintiff in offering the certificate of purchase admitted that the lands described therein are tide-lands within the limits of the city of San Pedro, the trial court did not err in sustaining the objection of defendants to the admission of the certificate in evidence.

APPEAL from a judgment of the Superior Court of Los Angeles County. Chas. Monroe, Judge.

The facts are stated in the opinion of the court.

Geo. S. Hupp, H. W. Duncan, and Wm. T. Blakely, for Appellant.

Minor P. Goodrich, for City of San Pedro, Respondent.

J. W. McKinley, for Southern Pacific Railroad Company, Respondent.

Flint & Barker, and Barker & Bowen, for other Respondents.

ANGELLOTTI, J.—This is an action to quiet title to certain land in Los Angeles County. Plaintiff alleges that he is the owner and entitled to the possession of the same. The allegation of such ownership and right to possession was denied by each of defendants. Upon the trial, the only evidence of title in plaintiff offered consisted of an application by plaintiff to the surveyor-general to purchase the land from the state as tide-lands, a certificate of purchase therefor issued November 5, 1901, to plaintiff by the register of the state land-office, and evidence that since the date of such certificate the land had been assessed to plaintiff and he had paid the taxes thereon. The documents were in all respects regular on their face. The certificate stated that the land was "State Tide Land," which it admittedly was. It was in effect stipulated by the parties at the time of the offer of the documents in evidence that the land was at the time of application and certificate wholly within the city of San

Pedro, an incorporated city of this state. This stipulation having been made, defendants objected to the admission of the documents in evidence, upon the ground that, the land being within an incorporated town, had been reserved from sale, and the certificate was therefore void. The objection was sustained and the documents excluded. Plaintiff, without offering any other evidence of title, rested, and defendants submitted the case without evidence. The court found that plaintiff was not the owner or entitled to the possession of any part of the land, and directed judgment of dismissal. This is an appeal by plaintiff from such judgment.

In view of the stipulation as to the location of this tide-land, the lower court did not err in excluding the application to purchase and the certificate of purchase issued thereunder.

It was not made to appear that the land fronted on any harbor, estuary, bay, or inlet used for purposes of navigation, and, therefore, it does not appear that the land was withheld from sale by virtue of section 3 of article XV of the constitution. At the time of such application to purchase, and ever since, section 3488 of the Political Code provided in terms that all tide-lands "within two miles of" any incorporated city or town other than San Francisco or Oakland are excluded from the operation of the provisions of law authorizing the sale of state lands. This provision withheld from the state officers all authority to grant or sell tide-lands within the city of San Pedro. The contention of appellant that this limitation as to lands subject to sale applies only to lands situated outside of, and not exceeding two miles beyond, the limits of incorporated cities and towns, is not of sufficient force to merit discussion. Lands in the city of San Pedro are necessarily within two miles thereof, and there is nothing in the language used by the legislature in former statutes or in this particular statute with reference to tide-lands in San Francisco or Oakland, which compels a contrary construction. The certificate of purchase was, therefore, for a reason not apparent on its face, void for want of authority in the state officials to convey the land described therein.

It is claimed that the defendants are not in a position authorizing them to question the validity of the certificate of purchase. This claim is based on the fact that the defendants

did not bring themselves in privity with the paramount source of title, and it is claimed that the certificate of purchase, valid on its face, is, therefore, conclusive against them. In support of this contention, *Doll v. Meador*, 16 Cal. 324, is relied on. While the opinion in that case may be construed as giving some support to the claim that one cannot attack a patent (and a certificate of purchase is the same in this respect as a patent), unless he connects himself in some way with the original source of title, it is now thoroughly established that although a patent is apparently regular on its face, yet if looking beyond the patent for a law upon which it is based "it is found that there is no law which authorizes such a patent under any state of facts, or that the particular tract named in the patent has been absolutely reserved from disposal, then the patent will be worthless and assailable from any quarter." (*Gale v. Best*, 78 Cal. 237, [12 Am. St. Rep. 44, 20 Pac. 550].) As we read *Doll v. Meador*, 16 Cal. 324, it recognizes this general rule, for it is said therein by the court, through Mr. Justice Field, that "if it" (the patent) "be issued in the absence of legislation directing a disposition of the property described, or, by an officer who is not invested with power to sign the same, or for an estate prohibited, its validity may also be controverted in any action, either directly or collaterally." In *Edwards v. Rolley*, 96 Cal. 408, [31 Am. St. Rep. 234, 31 Pac. 267], this court admitted that the claim here made found support in *Doll v. Meador*, 16 Cal. 324, but said that on this point the case has not been followed. It then said, speaking through Judge Temple: "In *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636, the true rule is declared in an opinion written by Judge Field. He says: 'On the other hand, a patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others.'" The court further quoted and approved the language of the United States supreme court in *Steel v. St. Louis Smelting Co.*, 106 U. S. 447, [1 Sup. Ct. 389], that if the lands purported to be conveyed by the patent "never were the property of the United States, or if no legislation authorized their

sale, or if they had been previously disposed of or reserved from sale, the patent would be inoperative to pass the title, and objection to it could be taken on these grounds at any time and in any form of action." (See, also, *Carr v. Quigley*, 57 Cal. 394; *McLaughlin v. Heid*, 63 Cal. 208; *Southern Pacific R. R. Co. v. Garcia*, 64 Cal. 515, [2 Pac. 397]; *Southern Pacific R. R. Co. v. McCuskey*, 67 Cal. 67, [7 Pac. 122]; *Cucamonga etc. Co. v. Moir*, 83 Cal. 101, [22 Pac. 55, 23 Pac. 359]; *Fredricks v. Zumwalt*, 134 Cal. 44, 48, [66 Pac. 38]; *Stoddard v. Chambers*, 43 U. S. (2 How.) 317; *Doolan v. Carr*, 125 U. S. 618, [8 Sup. Ct. 1228]; *Lake Superior etc. Co. v. Cunningham*, 155 U. S. 373, [5 Sup. Ct. 103].)

In *Klauber v. Higgins*, 117 Cal. 451, [49 Pac. 466], an action to quiet title, the land involved was tide-land within two miles of the city of San Diego, and the plaintiffs claimed under patents purporting to convey the same under the general laws of the state providing for the sale of tide-lands owned by the state, but reserving from sale tide-lands within two miles of any town or village. It was held that the patent being shown to be for lands for the sale of which no provision had been made, the law expressly reserving them from sale, the patent was absolutely void and inoperative to pass the title, and objection could be taken to it at any time and in any form of action by one who had no other claim than mere possession. The distinction is carefully made in the case just cited between the cases of the character under discussion, and those where the authority to issue the patent depends on the existence of particular facts in reference to the condition or character of the property, or the performance of certain antecedent acts, and officers have been appointed for the ascertainment of these matters in advance, who have passed upon them and given their judgment. In the latter class, it is well settled that the decision of the officers to whom the determination of the question is submitted by the law, though erroneous, cannot be collaterally attacked, even by one showing subsequent title from the same source. As put in *Gale v. Best*, 78 Cal. 237, [12 Am. St. Rep. 44, 20 Pac. 550]: "If a large body of public lands be subjected to sale or other disposition under a law which has merely a general reservation of such parts of those lands as may be found to be of a particular character—such as swamp or mineral—then the land department has juris-

diction to determine the character of any part thereof, and a patent is conclusive evidence that such jurisdiction has been exercised. In such a case, the patent could be attacked only by a direct proceeding, and by a person who connects himself directly with the title of the government." In such cases, the rule applied in *Doll v. Meador*, 16 Cal. 324, is properly applicable. But, as we have seen, this rule cannot be held applicable to lands which have by sufficient description of location been expressly reserved by the state from sale.

We regard it as absolutely immaterial in this connection that it does not appear that defendants were in possession of the land. Some of the cases cited state that one in possession is in a position to contest the right of another claiming under a void patent, from which it might be inferred that possession at least is essential to such a contest. It is elementary that a plaintiff in an action to quiet title cannot prevail unless he shows title in himself. If he has no title, he cannot complain that some one else, also without title, asserts an interest in the land. (*Pennie v. Hildreth*, 81 Cal. 127, [22 Pac. 398]; *United States Assoc. etc. v. Pacific Imp. Co.*, 139 Cal. 370, [69 Pac. 1064, 72 Pac. 988]; *City of San Diego v. Allison*, 46 Cal. 162; *City and County of San Francisco v. Ellis*, 54 Cal. 72; *Winter v. McMillan*, 87 Cal. 256, [22 Am. St. Rep 243, 25 Pac. 407]; *Heney v. Posolli*, 109 Cal. 58, [41 Pac. 819], *McGrath v. Wallace*, 116 Cal. 551, [48 Pac. 719]; *McKenzie v. Budd*, 125 Cal. 602, [58 Pac. 199]; *Schroder v. Aden G. M. Co.*, 144 Cal. 630, [78 Pac. 20].) A defendant in such an action may always effectually resist a decree against himself, by showing simply that the plaintiff is without title. If plaintiff here had simply shown himself to be in possession of the land involved, he would have made a *prima facie* case of ownership, and would have been entitled to judgment in the absence of proof of actual ownership by defendants. He did not do this, but relied solely on the certificate of purchase, as a conveyance by the state to him. This, valid on its face, would have been *prima facie* evidence of ownership, it is true, but would have been no more, and defendants necessarily would have had the right to show the facts *aliunde* which rendered it worthless and inoperative as a conveyance, and thus rebut the *prima facie* case of ownership in plaintiff. It being established that a patent issued under such circum-

stances is absolutely void and collaterally assailable in any form of action, this result inevitably follows. Accompanied, as the offer of this evidence by plaintiff was, by the admission of plaintiff of the facts showing the invalidity of the proceedings of plaintiff for the purchase of the land and the certificate of purchase based thereon, all of which defendants would have been entitled to show if the admission had not been made, the trial court did not err in sustaining the objection of defendants to the evidence.

The judgment is affirmed.

Sloss, J., concurred.

SHAW, J., concurring.—I concur in the judgment. I agree with my associates that, under section 3488 of the Political Code, the surveyor-general's certificate of sale of tide-lands situated within an incorporated city is void and that the certificate in question did not disclose its invalidity on its face and was, therefore, *prima facie*, valid.

I do not agree to the proposition that the defendants, under the pleadings in this case, had shown a standing or interest sufficient to give them, or either of them, a right to introduce evidence to defeat the plaintiff's *prima facie* title. The complaint did not aver that the plaintiff, or either of the defendants, was in possession. It counted upon title alone. The suit was brought under section 738 of the Code of Civil Procedure, to determine the adverse claims alleged to have been asserted by each of the defendants. None of them, in their respective answers, pleaded any adverse claim, or alleged possession of the land. They merely denied the allegations of the complaint. The action is in the nature of an action *in rem*. In such actions, the rule is elementary and practically universal that no party will be permitted to interpose to defeat the *prima facie* title of another party to the thing, derived by him from a third person, unless such attacking party pleads, or shows in some authorized manner, that he has some right, title, or interest in the thing. A defendant who does not, himself, claim some right, title, interest, or possession, has no *status* to question the validity of a conveyance of the property by a third person to the plaintiff. None of the cases cited in the opinion of Justice Angellotti, as I

understand them, really controvert this principle, except, perhaps, *United Land Assoc. v. Pacific Imp. Co.*, 139 Cal. 370, [69 Pac. 1064, 72 Pac. 988]. In all the others, except *San Francisco v. Ellis*, 54 Cal. 72, both parties pleaded either title, or possession, or the complaint alleged that the defendant was in possession. Hence, any remarks in these cases to the effect that the plaintiff must prove his allegations of title in himself, or fail in his suit, are either *obiter dicta*, or manifestly in affirmance of, and not contrary to, the rule I have stated. In *United Land Assoc. v. Pacific Imp. Co.*, the defendants did set up some claim in the answer, but it seems to have been held to have been insufficient to show a valid claim, and it appears that defendants were in possession. The point was not seriously considered and the statements there made can scarcely have been intended to declare a different rule. The case of *San Francisco v. Ellis*, 54 Cal. 72, is really an affirmance of the rule stated. It was an action to cancel a deed from the state tide-land commissioners to the defendant. The contents of the answer are not shown, but that is not important, since the complaint in such an action must have disclosed, at least, an apparent title in the defendant. The plaintiff failed to prove that it had either title or interest in the land, and this was held to be fatal to its right to cancel the deed to the defendant, regardless of the question of its validity.

The cases declaring the rule are numerous. The leading case in this state is *Doll v. Meador*, 16 Cal. 296. In discussing the right of one, not himself claiming right or title to the land, to attack the validity of title papers, valid on their face, purporting to convey the land from a third person to the plaintiff, the court there says (p. 325): "The patent . . . cannot be attacked collaterally by parties who show no color of title in themselves. In such cases the parties without title cannot be heard at all." The discussion is very elaborate and the question is thoroughly considered. The proposition has been repeatedly affirmed in subsequent decisions. (*People v. Stratton*, 25 Cal. 251; *O'Connor v. Frashear*, 56 Cal. 501; *Churchill v. Anderson*, 56 Cal. 60; *Rhodes v. Craig*, 21 Cal. 422; *Kile v. Tubbs*, 23 Cal. 442; *Terry v. Megerle*, 24 Cal. 629, [85 Am. Dec. 84]; *Carder v. Baxter*, 28 Cal. 100; *Durfee v. Plaisted*, 38 Cal. 83; *Kentfield v. Hayes*, 57 Cal. 410; *Burling*

v. *Tompkins*, 77 Cal. 261, [19 Pac. 429]; *Dreyfus v. Badger*, 108 Cal. 63, [41 Pac. 279]; *Standard Co. v. Habishaw*, 132 Cal. 119, [64 Pac. 113]; *Phillips v. Carter*, 135 Cal. 606, [87 Am. St. Rep. 152, 67 Pac. 1031]; *Harrington v. Goldsmith*, 133 Cal. 169, [68 Pac. 594]; *McCabe v. Goodwin*, 106 Cal. 490, [39 Pac. 941]; *Pioneer Co. v. Maddux*, 109 Cal. 641, [50 Am. St. Rep. 67, 42 Pac. 295]; *Directors v. Abila*, 106 Cal. 363, [39 Pac. 794]; *McFaul v. Pfankuch*, 98 Cal. 403, [33 Pac. 397]; see, also, *Wall v. Magnes*, 17 Colo. 476, [30 Pac. 56]; *Amler v. Conlon*, 22 Colo. 150, [43 Pac. 1002].) The extreme doctrine of *Doll v. Meador*, and some others of the above cases, that even one in possession had no standing to make such attack, unless he connected himself with the paramount source of title, has been properly modified in subsequent decisions allowing such party to protect his possession by defeating the plaintiff's title, without proving title in himself. (*Klauber v. Higgins*, 117 Cal. 451, [49 Pac. 466]; *Edwards v. Rolley*, 96 Cal. 408, [31 Am. St. Rep. 234, 31 Pac. 276]; *Cucamonga Co. v. Moir*, 83 Cal. 101, [22 Pac. 55, 23 Pac. 359].) And this is the doctrine of the supreme court of the United States. (*Reynolds v. Iron S. M. Co.*, 116 U. S. 687, [6 Sup. Ct. 601].)

But in the present case the plaintiff admitted that the land was in the city of San Pedro. This admission, which he was under no compulsion to make, was equivalent to a confession that he neither has, nor can have, any right, title, or interest in the premises, since he offered no other evidence than his application and the certificate issued thereon. No possessory rights are claimed and none were adjudged. The judgment dismisses the action and gives defendants their costs. The dismissal was fully justified by the voluntary admission of the plaintiff. It does not appear that the defendants' costs are of any substantial amount. A judgment will not be reversed unless the appellant shows substantial prejudice to himself therefrom. The admission of the plaintiff and the failure of the defendants to set up affirmatively any possession, right, or title, make it practically a moot case, for neither party, under existing laws, could obtain any right, title, or interest in the land. I perceive no substantial reason for interfering with the disposition of the case in the court below.

Hearing in Bank denied.

[S. F. No. 4368. In Bank.—February 11, 1908.]

UNITED RAILROADS OF SAN FRANCISCO, Plaintiff,
v. E. P. COLGAN, Controller of the State of California,
et al., Defendants; E. P. COLGAN, Controller, etc.,
Appellant; E. J. SMITH, Tax-Collector of the City and
County of San Francisco, Respondent.

TAXATION OF STREET RAILROAD OPERATING IN MORE THAN ONE COUNTY—JUDGMENT SUSTAINING COUNTY ASSESSMENT—STATE NOT AGGRIEVED BY COUNTY ASSESSMENT IN EXCESS OF ASSESSMENT BY BOARD OF EQUALIZATION.—In an action involving the question whether a street-railroad corporation, operating its lines in more than one county of the state, should be assessed by the state board of equalization and its taxes paid to the state controller, or by the county assessors and its taxes paid to the county tax-collectors, an appeal from a judgment by the state controller sustaining the validity of the county assessments and the payment to the county tax-collectors will be dismissed, when it appears that the amount received from the taxes for the benefit of the state, under the county assessments, is in excess of the amount that could be received by it, should the assessment by the state board of equalization be sustained. Under such circumstances, neither the state nor the state controller is a party aggrieved by the judgment.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order refusing a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, and George A. Sturtevant, Deputy Attorney-General, for Appellant.

William G. Burke, City Attorney, A. S. Newburgh, Assistant City Attorney, Percy V. Long, City Attorney, and William I. Brobeck, Assistant City Attorney, for Respondent.

ANGELLOTTI, J.—The state board of equalization claimed the right to assess and assessed for the fiscal year 1903-1904, the franchise, roadway, roadbed, rails, and rolling-stock of plaintiff, a corporation having its principal place of business in the city and county of San Francisco, upon the theory

that such railroad was a "railroad" operated in more than one county (Const., art. XIII, sec. 10). The assessors of the city and county of San Francisco and San Mateo County, the two counties in which plaintiff operates its railroad system, claimed the right to assess and assessed the portions thereof legally situate in their respective counties, upon the theory that the railroad was purely a "street-railroad," and not a "railroad" within the meaning of that word as used in section 10, of article XIII, of the constitution. (See *San Francisco & San Mateo etc. v. Scott*, 142 Cal. 222, [75 Pac. 575].) The assessment valuation made by the state board of equalization, apportioned to the city and county of San Francisco, was much lower than that of the city and county authorities, and the total assessment valuation made by such state board of all the property in both counties was much lower than the valuation by the San Francisco authorities of that portion claimed to be assessable by them. The state controller claimed the right to collect all the taxes levied upon the state assessment, including the city and county taxes for the use of the city and county of San Francisco, while the tax-collector claimed the right to collect all the taxes levied upon said city and county assessment, including the state tax for the use of the state. The taxes, according to the city and county assessment valuation, amounted to \$364,572.99, and according to the state valuation three hundred and twenty-seven thousand dollars. Under these circumstances, plaintiff brought this action to compel the state controller and the city and county tax-collector to settle their conflicting claims between themselves, paying into court the amount of taxes due upon the higher assessment. Plaintiff was thereupon relieved from further prosecution of the action, and ordered discharged from any and all liability on account of said taxes, and the defendants required to interplead in the action. The action was tried as between the state controller and the city and county tax-collector, and resulted in a judgment sustaining the validity of the city and county assessment, and the consequent right of the city and county tax-collector to receive the whole amount, which amount was ordered paid to him. The state controller has appealed from this judgment and from an order denying his motion for a new trial, and he, representing the state and with no interest

in the appeal except as such representative, is the only appellant. The only question sought to be presented by the appeal of the state controller is which of the two assessments, the state assessment or the city and county assessment, was valid.

Under the circumstances, respondent tax-collector urges that the question presented by the appeal is merely an abstract question, not affecting the substantial rights of the state, and that the appeal should be dismissed. It is apparent that the only way in which the state, represented here by appellant, can be affected by a reversal or a modification of the judgment, is to be deprived of a portion of the amount that will come to it under the judgment as it now stands. If the judgment stands, the city and county of San Francisco will be required to forthwith pay to the state the state portion of the taxes collected, which, the city and county assessment valuation being much higher than the state assessment valuation, will be several thousand dollars more than the state portion of the taxes that could be retained by the state upon collection of the taxes by the controller on the state assessment. Indeed, the transcript on appeal shows that at the very inception of this proceeding, the portion of the amount paid into court that would go to the state as state taxes on the state assessment, one hundred and thirty-three thousand dollars, was ordered paid to the state controller for the use of the state, and the portion of such amount that would go to the city and county of San Francisco on the state assessment, one hundred and ninety-four thousand dollars, was ordered paid to the city and county tax-collector, leaving in fact only \$37,572.79 in court subject to final judgment. Under the judgment, the state will receive the state portion of this amount. If it succeeds on this appeal, it will receive no part thereof. Under the peculiar circumstances, it appears here that neither the state nor its representative, the state controller, is a party aggrieved by the judgment. No one else is complaining thereof. Practically the appeal is by a party whose sole substantial complaint is that the effect of the judgment is to give him more than he is entitled to. We are of the opinion that this court should not entertain the appeal under the circumstances disclosed by the record.

The appeal is dismissed.

Shaw, J., McFarland, J., Henshaw, J., Lorigan, J., and Sloss, J., concurred.

BEATTY, C. J., concurring.—I concur in the order of dismissal and in the opinion of the court. The practical effect of the order is an affirmance of this particular judgment, but in view of the importance of the question involved, and the certainty that it must be met sooner or later, I should have preferred a direct affirmance of the judgment, which is clearly sustained by our decision in *San Francisco & San Mateo Ry. Co. v. Scott*, 142 Cal. 222, [75 Pac. 575].

[L. A. No. 2134. In Bank.—February 13, 1908.]

CARRIE E. LOCKE, Appellant, v. WILLIAM C. LOCKE,
Respondent.

DIVORCE — WILLFUL NEGLECT — FAILURE TO SUPPORT WIFE — SUPPORT FROM WIFE'S EARNINGS — DELAY IN COMMENCING ACTION — LACHES.
—Under sections 92, 105, and 107 of the Civil Code, a wife is entitled to a divorce on account of the willful neglect of her husband, if for a continuous period of one year prior to her application therefor he neglected to provide for her the common necessities of life, by reason of his idleness and dissipation, and during that period she did not support herself from her own earnings. And the fact that for eight years prior to such period she did support herself from her own earnings is not a ground for denying the divorce. Her failure during such periods to institute a prior action for divorce would not bar her right thereto under sections 124 and 125 of the Civil Code, nor operate to estop her by laches.

'APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Monroe, Judge.

The facts are stated in the opinion of the court.

Gardner & Fairall, and Cyril H. Bretherton, *Amicus Curiae*.
for Appellant.

William E. Locke, for Respondent.

McFARLAND, J.—This is an action by the wife against the husband for a divorce upon the ground of willful neglect. The court made findings and rendered judgment denying the divorce. From this judgment plaintiff appeals.

It is averred in the complaint "that the defendant for more than one year last past has failed to provide the plaintiff the common necessities of life because of his idleness, profligacy, and dissipation." The court found "that the defendant for more than one year last past has failed to provide the plaintiff the common necessities of life, because of his idleness and dissipation; that he was an able-bodied man able to earn good wages and to have the means and ability to furnish plaintiff the common necessities of life but has wholly failed to furnish her with the common necessities of life." The court further finds that the plaintiff and defendant intermarried in the city of Denver, in the state of Colorado, on the eighth day of September, 1897. It further finds "that shortly after the marriage of plaintiff and defendant they went from Colorado to Texas, and during their stay in Texas plaintiff was compelled to and did support herself; that thereafter the defendant left the plaintiff in Texas without any means of support, going to Denver, where the plaintiff afterwards joined him; that the defendant failed to make any provision at all for the plaintiff, who, with money furnished by her relatives, started a hair-dressing parlor, where, in connected rooms, plaintiff and defendant resided during about three years prior to the plaintiff coming to California. During all this time plaintiff was compelled to and did support herself by her own earnings and the defendant contributed nothing toward her support, but on the contrary was furnished by her with money from her earnings, and pawned some of her personal effects and used the money." From these facts the court found as conclusions of law "that the plaintiff was supported by her own earnings for eight years prior to the commencement of this suit and that said earnings were the community property of plaintiff and defendant," and further that "there was an unreasonable lapse of time before the commencement of this action, even before the plaintiff came to California. The divorce must be denied." But the court further found "that plaintiff by reason of ill health brought on by overwork gave up her business in Colorado

and came to California in October, 1905, that during the time since leaving Colorado she has been unable to support herself, but has been assisted by friends to the extent of being furnished board and lodging free by them." We are of the opinion that upon the findings the court should have given judgment for plaintiff, and erred in denying it. "Willful neglect" is enumerated in section 92 of the Civil Code as a cause of divorce, and is defined in section 105 as "the neglect of the husband to provide for his wife the common necessities of life, he having the ability to do so; or it is the failure to do so by reason of idleness, profligacy, or dissipation"; and by section 107 it must continue for one year. If it be law, as intimated by the court below (which question we do not here consider or determine), that a wife cannot obtain a divorce for willful neglect if she supports herself by her own work because her earnings are community property and therefore, in legal contemplation, contributed by the husband, still that harsh rule would not defeat the action in the case at bar; because for more than a year before the commencement of the action plaintiff could not and did not support herself, and therefore, according to this theory, she had no cause of action until she ceased her self-support. There was, therefore, willful neglect for more than the full statutory period immediately before the commencement of the suit, entirely free of any consideration of former self-support of the wife; and this constituted, in itself, a perfect and independent cause of action not affected by the previous conduct of the parties. We do not think that the provisions of sections 124 and 125, Civil Code, relating to "unreasonable lapse of time before the commencement of the action," affect the case at bar. It would be attributing to the legislature a very unjust and unreasonable purpose to hold the meaning of the code to be that when a husband is guilty of willful neglect to provide for his wife she must immediately, or within any particular time, commence an action for divorce and must not endeavor to support herself and avoid what may be to her the very disagreeable event of a divorce, or she must forfeit forever the right to procure a divorce for willful neglect, either past or future; and to compel that purpose to be attributed to the legislature would require language to that effect much more direct and clear than that

found in the code. It is not the policy of the law to encourage divorces and to urge wives to bring suit to obtain them. We do not think that in the case at bar the plaintiff is estopped by laches from maintaining the present action merely because under the facts developed in the record she refrained from bringing other suits for previous willful neglects by defendant. (See *Thompson v. Thompson*, 121 Cal. 11, [53 Pac. 403].)

The judgment is reversed and the cause remanded with directions to the superior court upon the findings as they stand, to render an interlocutory judgment of divorce in favor of plaintiff as prayed for in the complaint.

Sloss, J., Angellotti, J., Lorigan, J., and Henshaw, J., concurred.

SHAW, J., concurring.—I concur in the judgment. During the time the plaintiff supported herself she had no cause of action for divorce on the ground of non-support. (*Washburn v. Washburn*, 9. Cal. 476; *Rycraft v. Rycraft*, 42 Cal. 445.) The delay during that time to begin the action could not affect the case, for she then had no right of action. The cause of action she had was for non-support during the year ending in October, 1906. She began the action therefor on November 8, 1906.

[Crim. No. 1367. In Bank.—February 13, 1908.]

THE PEOPLE, Respondent, v. J. W. FINLEY, Appellant.

CRIMINAL LAW—ASSAULT BY PERSON UNDERGOING LIFE IMPRISONMENT—CONSTITUTIONAL LAW—PUNISHMENT BY DEATH.—Section 246 of the Penal Code, declaring that "Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death," is not unconstitutional. That section neither denies to such person the equal protection of the law guaranteed by the fourteenth amendment to the constitution of the United States, nor does it contravene the provisions of section 11 of article I of the state constitution, declar-

ing that all laws of a general nature shall have a uniform operation.

ID.—INSTRUCTIONS AS TO FORMS OF VERDICT—EVIDENCE OF BUT ONE OFFENSE.—In a prosecution under that section, the refusal of the court, at the request of the defendant, to instruct the jury that they might render any one of four verdicts according to their conclusion from the evidence,—viz.: guilty as charged in the indictment, guilty of assault with a deadly weapon, guilty of simple assault, or not guilty,—is not error, where the evidence as contained in the record shows that the defendant was either guilty as charged in the indictment or not guilty at all, and the jury were charged that if the evidence did not satisfy them beyond a reasonable doubt that he was guilty of the offense charged, they must find him not guilty.

ID.—FORM OF INDICTMENT—COURT COMMITTING DEFENDANT.—An indictment for such crime is sufficiently specific if it charges, in the language of the section, that the defendant was then and there a person confined in and undergoing a life sentence at the state prison. It is unnecessary to charge that he was sentenced to life imprisonment in the state prison by a designated court of competent jurisdiction.

ID.—EVIDENCE OF COMMITMENT.—The record of the commitment of the defendant to the state prison was competent evidence for the prosecution on the trial.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order refusing a new trial. E. C. Hart, Judge.

The facts are stated in the opinion of the court.

Samuel T. Bush, for Appellant.

U. S. Webb, Attorney-General, J. Charles Jared, Deputy Attorney-General, and A. M. Seymour, District Attorney, for Respondent.

HENSHAW; J.—The appellant while undergoing a life sentence in the state prison at Folsom was indicted under section 246 of the Penal Code, tried upon the indictment, found guilty and the death penalty imposed. From the judgment and from the order denying his motion for a new trial he prosecutes this appeal.

The section of the code defining his crime is in the following language: "Every person undergoing a life sentence in a

state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death."

The principal contentions of the appellant, advanced in different forms, resolve themselves into two propositions, both going to the constitutionality and validity of section 246 of the Penal Code. The first of these propositions is that it denies to the defendant the equal protection of the law guaranteed by the fourteenth amendment to the constitution of the United States. Second, that it contravenes the provisions of section 11 of article I of the constitution of this state declaring that all laws of a general nature shall have a uniform operation.

As to the genesis and origin of this comparatively new section of our Penal Code, it has long been a part of judicial knowledge, of legislative knowledge, and, indeed, of general knowledge, that convicts in penal institutions, undergoing sentences for life, constitute a most reckless and dangerous class. The conditions of their sentences destroy their hopes and with the destruction of hope all bonds of restraint are broken and there follows a recklessness leading to brutal crimes. These crimes became the more frequent as the impotency of the law to mete out adequate punishment for them was discerned. They were crimes of violence committed not alone against fellow inmates, but upon the custodians, officers, and guards of the institutions. The series of bloody and savage escapes and attempts to escape from the state prisons, which attempts were usually organized and headed by "life-termers," form a part of the history of our state. Indeed, it is known that at times the prison officials have deemed it wise to clothe the "life-termers" in a characteristic garb, as a red shirt, that they might be the better watched throughout the day and the more readily picked out by the armed guards in cases of an emeute. Under this well-recognized condition of affairs it seemed expedient to the legislature to meet the situation by the enactment of section 246 of the Penal Code.

It is upon the authority of the *City of Pasadena v. Stimson*, 91 Cal. 252, [27 Pac. 604], and the numerous cases of like import, declaring that class legislation must be based upon

some natural, intrinsic, constitutional, reasonable distinction, or otherwise that it is in violation of section 11 of article I of the constitution of this state, that the appellant argues against the validity of the code provision. In this regard his contention is that there is no reasonable distinction to be drawn between the case of a convict undergoing a life sentence as such, and one undergoing a sentence for a period of years which in all human probability will exceed the term of natural life. But there are valid reasons which justify the distinction. The "life-termers," as has been said, while within the prison walls, constitute a class by themselves, a class recognized as such by penologists the world over. Their situation is legally different. Their civic death is perpetual. As to a convict incarcerated for a term of years, his civic death ends with his imprisonment. The good-conduct laws, whereby the term of imprisonment is shortened as to all other convicts, have no application to those undergoing a life sentence. Generally speaking, the crimes for which convicts suffer life sentences are graver in their nature and give evidence of more abandoned and malignant hearts than do the crimes of those undergoing sentence for years. And, finally, if the legislature sought to make the law applicable to convicts other than "life-termers," the difficulty which it would experience in fixing the term of imprisonment to which it should apply gives evidence itself that there is a reasonable rational class distinction between the "life-terminer" and the convict under sentence for years. It is concluded, therefore, that the classification in question is not arbitrary, but is based upon valid reasons and distinctions.

Nor can it be said that the act in question is violative of the fourteenth amendment of the constitution of the United States. This amendment means simply that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons, or other classes, in the same place and under like circumstances. (*Missouri v. Lewis*, 101 U. S. 22.) Paraphrasing the language of the supreme court of the United States in *Moore v. Missouri*, 159 U. S. 676, [16 Sup. Ct. 179], we cannot perceive that appellant was denied the equal protection of the laws for every other person in like cases with him and convicted as he has been would be subjected to like punishment.

Defendant complains of the refusal of the court to give a requested instruction to the jury to the effect that they might render any one of four verdicts according to their conclusion from the evidence, viz.: guilty as charged in the indictment, guilty of assault with a deadly weapon, guilty of simple assault, and not guilty. There was no error in this action of the court. In view of the evidence as shown by the record the defendant was either guilty as charged in the indictment, or not guilty at all, and the jury were charged that if the evidence did not satisfy them beyond a reasonable doubt that he was guilty of the offense charged, they must find him not guilty.

It is finally contended that the indictment is defective in failing to charge that the defendant was sentenced to life imprisonment in the state prison by a court of competent jurisdiction, designating it. The indictment charged in the language of the code that defendant was then and there a person confined in and undergoing a life sentence at the state prison. It was sufficiently specific to enable defendant to prepare his defense. It is plainly one of those crimes which, as to the matter in question, it is sufficient to charge in the language of the statute. (*People v. O'Brien*, 96 Cal. 174, [31 Pac. 45] ; *People v. King*, 125 Cal. 369, [58 Pac. 19].) Upon the trial the record of the commitment of the defendant to the state prison was offered and admitted in evidence over the objection of the defendant. This record was not only competent evidence, but the method adopted was the proper method for its presentation to the court. (*People v. Williams*, 130 Ala. 31, [30 South. 337].)

For these reasons the judgment and order appealed from are affirmed.

Angellotti, J., Shaw, J., Sloss, J., Lorigan, J., McFarland, J., and Beatty, C. J., concurred.

[L. A. Nos. 1913, 1927. Department One.—February 14, 1908.]

KATE M. BELL and JAMES L. CRITTENDEN, Appellants, v. SAN FRANCISCO SAVINGS UNION et al., Respondents, and TERESA M. BELL, Administratrix of the Estate of Thomas Bell, Deceased, and U. S. OIL AND LAND COMPANY, Appellants.

NEW TRIAL—ADVERSE PARTY SERVED WITH NOTICES OF INTENTION—DEATH PENDING MOTIONS — APPEALS FROM ORDERS — SERVICE OF NOTICE.—An adverse party, to whom the notices of intention of various parties separately moving for a new trial were addressed, and who was served therewith, became a party to each proceeding on motion for a new trial, and did not cease to be a party thereto by reason of his death after such service, before the motions were heard; and upon appeal from each of the orders denying such motions his representative must be served with the notice of appeal.

ID.—REPRESENTATIVE NOT APPOINTED—LOSS OF APPEALS—ORDERS NOT REVERSIBLE.—If a representative of the estate of such adverse party has not been appointed, and cannot be appointed in time for appeal, the appeals are lost, and the orders cannot be reversed, and if not dismissed must be affirmed.

ID.—SERVICE UPON ATTORNEY OF ADVERSE PARTY—TERMINATION OF AUTHORITY.—The death of the adverse party operated as a termination of the authority of his attorney, and the service of notices of appeal upon him was ineffective.

ID.—NOTE SIGNED BY ADVERSE PARTY—MOTION BY SECURED CREDITOR TO DISMISS APPEALS BASED ON RECORD — FAILURE TO PRESENT CLAIM NOT CONSIDERED.—Where the adverse party was the maker of a note to a secured corporation which moved to dismiss appeals for failure to serve the adverse party with notice thereof, the motion must be determined only by what appears in the record upon appeal; and a showing that the creditor secured had not presented a claim against the estate of the adverse party cannot be considered.

ID.—VOLUNTARY APPEARANCE OF EXECUTOR OF ADVERSE PARTY—LAPSE OF TIME FOR APPEAL—JURISDICTION NOT CONFERRED.—The voluntary appearance of the executor of the adverse party, after the lapse of the time for appeal from the orders denying a new trial, cannot confer jurisdiction to determine such appeals upon the merits.

ID.—APPEALS RETAINED FOR MODIFICATION OF JUDGMENT BENEFITING APPELLANTS AND ADVERSE PARTY.—Though no modification of the judgment can be allowed to the detriment of the estate of the adverse party, the appeals will be retained for modification of the judgment in favor of the creditor secured in respect of excessive interest allowed, which will benefit and not injure the estate of the

adverse party, and will also benefit the appellants in the matter of an accounting between estates represented by them, which are included in the security held by such creditor.

ID.—EXCESSIVE INTEREST UPON INTEREST—WHOLE INTEREST AVOIDED—CONSTRUCTION OF CODE.—Under section 1919 of the Civil Code, providing that "the parties may, in any contract in writing whereby any debt is secured to be paid, agree that if the interest . . . is not punctually paid, it shall become a part of the principal, and thereafter bear the same rate of interest as the principal debt," a provision in the note secured, signed by the adverse party, making the unpaid interest on interest bear a greater rate than that of the principal sum secured, renders the whole interest void in its entirety, and not merely as to the excess of the rate agreed upon, and the judgment must be modified in so far as it allows such illegal interest.

ID.—SEVERANCE OF ILLEGAL FROM LEGAL INTEREST.—Where the allowance of illegal interest continued during the maturity of the note and an agreed extension thereof, but the note provided that after maturity of the principal any unpaid principal and interest shall bear the same increased rate, such provision is legal; and in modifying the judgment there must be a severance of the illegal from the legal interest, and only the former can be deducted from the judgment.

APPEALS from a judgment of the Superior Court of Santa Barbara County, and from orders denying motions for a new trial. J. W. Taggart, Judge.

The facts are stated in the opinion of the court, and in the decisions therein referred to.

James L. Crittenden, *in pro. per.*, and for U. S. Oil and Land Company, defendant, Appellants.

T. Z. Blakeman, for Teresa Bell, Administratrix, Appellant.

Canfield & Starbuck, for San Francisco Savings Union et al., Respondents.

SLOSS, J.—This action involves the rights of the parties in two tracts of land in Santa Barbara County containing, respectively, ten thousand and four thousand acres. Many of the facts here presented have been before this court in *Bell v. Staacke*, 141 Cal. 186, [74 Pac. 774], and 151 Cal. 544, [91 Pac. 322], and we refer to the opinions on those appeals for a general history of the transactions leading up to this litigation.

The present action was brought by Kate M. Bell, James L. Crittenden, and Sidney M. Van Wyck, Jr., claiming as successors in interest of John S. Bell, against the San Francisco Savings Union, its trustees, and the successors in interest of Thomas Bell, deceased, to obtain a decree quieting the title of the plaintiff in and to the ten-thousand-acre tract referred to in the above-mentioned opinions. The San Francisco Savings Union, which was not a party to the action of *Bell v. Staacke*, was brought into this case by reason of the fact that it had advanced upon the promissory note of George Staacke, guaranteed by Thomas Bell, the sum of sixty thousand dollars, and had taken as security for the payment of said note a deed of trust of the ten-thousand-acre and the four-thousand-acre tracts, executed by Staacke to Henry C. Campbell and Thaddeus D. Kent, as trustees.

Prior to the conveyance to Campbell and Kent, the legal title to this property was vested in George Staacke. Staacke claimed no beneficial interest whatever, but was holding purely as trustee. The controversy in *Bell v. Staacke* was as to the nature of the trust upon which he held, the claim of the plaintiff in that action (John S. Bell) being that Staacke held solely as trustee for him as to the ten-thousand-acre tract, it being conceded that he held the four-thousand-acre tract as trustee for Thomas Bell. The estate of Thomas Bell contended, in the case of *Bell v. Staacke*, that the ten-thousand-acre tract was held by Staacke in trust, first, for the repayment to Thomas Bell of certain advances made by him to John S. Bell, the surplus only after such payment to go to John S. Bell. This controversy was, as the result of the two trials in *Bell v. Staacke*, finally determined in favor of the Thomas Bell estate. The plaintiffs, claiming as successors in interest of John S. Bell, renew in this case his former contention, and, in addition, claim that the deed of trust executed by George Staacke to Campbell and Kent, as trustees for the San Francisco Savings Union, was made by Staacke without the consent of John S. Bell, the beneficiary of the trust, and that the Savings Union and its trustees had notice, before the payment of any part of the loan of sixty thousand dollars and before the execution of the deed of trust, that John S. Bell was the owner of the ten-thousand-acre tract.

Campbell and Kent, as trustees for the San Francisco Savings Union, have been succeeded by the Mercantile Trust Company of San Francisco, a corporation. The Savings Union and its trustees answered, denying that at the time of the advance of the sixty thousand dollars and of the acceptance of the trust-deed they had any notice of the alleged rights or claims of John S. Bell, and alleging that John S. Bell knew of the transaction at the time and received the benefit of the loan, the amount of which had been, with his consent, credited upon his indebtedness to Thomas Bell by the latter. Staacke, who was named as one of the parties defendant in the complaint, answered individually and as executor of the will of Thomas Bell, deceased, denying the material allegations of the complaint. After filing this answer Staacke was removed as executor of the last will of Thomas Bell, and was succeeded by Teresa Bell as administratrix of the estate of Thomas Bell, deceased, with the will annexed. As such administratrix, Mrs. Bell filed an amendment to the answer filed by Staacke, as executor, by which she claimed that the lien of the Thomas Bell estate upon the ten-thousand-acre tract was prior to the claim of the San Francisco Savings Union and that the proceeds of any sale should be applied first to the payment of the indebtedness of John S. Bell to Thomas Bell. Thereafter a cross-complaint was filed by the Savings Union and those who had acted and were acting as trustees under the deed of trust to secure its note, together with Staacke, asking that the court "take under its direction and control the execution by said defendant Mercantile Trust Company of the trust created by said grant (the deed of trust to Campbell and Kent) . . . and direct, instruct and supervise said defendant in executing said trust." The U. S. Oil and Land Company, claiming as a successor in interest to the plaintiff, James L. Crittenden, was brought in by amendment as an additional defendant to the cross-complaint. By the various answers to the cross-complaint, the parties representing the John S. Bell interest and the Thomas Bell interest raised substantially the same issues as those which had been raised by the pleadings heretofore discussed, and in addition, it was pleaded that the note held by the Savings Union was barred by the statute of limitations and that the right of the cross-complainants to any affirmative relief was barred by limitation.

The cause was tried upon these issues, and findings were made in accord with the contention of the San Francisco Savings Union. The court did not make any finding as to the statute of limitations, but the judgment contained an adjudication that the enforcement of the trusts declared in the deed from Staacke to Campbell and Kent "is not barred by any statute of limitations of this state." The decree directed the Mercantile Trust Company to sell both tracts of land, selling the ten-thousand-acre tract first, and to pay out of the proceeds of sale to the San Francisco Savings Union the amount found to be due to it on its note, and the balance of the proceeds, if any, to the defendant Staacke, his heirs and assigns. It is also adjudged that the plaintiffs take nothing by the action.

The plaintiff Crittenden, who had acquired Van Wyck's interest, and the defendant U. S. Oil and Land Company, moved for a new trial, which was denied, and they now appeal from the judgment and from the order denying their motion for a new trial. The defendant Teresa Bell, as administratrix, moved for a new trial as to the issues arising upon the pleadings between said Teresa Bell, as administratrix, and the defendant San Francisco Savings Union, its trustees, and George Staacke. This motion being denied, said administratrix appealed from the order denying her motion and from the judgment, except that portion of it adjudicating that the plaintiffs and the defendant U. S. Oil and Land Company take nothing by the action.

The respondents San Francisco Savings Union and its trustees move to dismiss all four of these appeals upon the ground that the defendant George Staacke was an adverse party to all of the appellants and that no notice of appeal was ever served upon him, or upon any one representing him.

Staacke died on the twelfth day of April, 1905. Both appeals from the judgment and both appeals from the orders denying the motions for new trial were taken after his death. No service of any of the notices of appeal upon any representative of Staacke was shown. Each of the notices of intention to move for a new trial was addressed to Staacke, among other parties, and each was served on his attorneys and filed before his death. If this made Staacke a party to

the proceedings for new trial, he was, if an adverse party, entitled to service of notice of appeal from the order denying a new trial. If he was not a party to such proceedings, failure to serve him with notice of appeal would not justify a dismissal of that appeal, but the order denying the motion would have to be affirmed because he had not been a party to the proceedings for new trial in the court below. (*Estate of Ryer*, 110 Cal. 556, [42 Pac. 1082]; *Herriman v. Menzies*, 115 Cal. 15, 26, [56 Am. St. Rep. 81, 44 Pac. 660, 46 Pac. 730]; *Johnson v. Phenix Ins. Co.*, 146 Cal. 571, [80 Pac. 719]; *Johnson v. Phenix Ins. Co.*, 152 Cal. 196, [92 Pac. 182].) We have no doubt that Staacke did become a party to both proceedings for a new trial by reason of the fact that the notice of intention to move for a new trial was in each instance addressed to and served upon him. The filing and service of such notice of intention is the initiation of a proceeding for a new trial. (Code Civ. Proc., sec. 659.) In so far as the proceeding for a new trial is a "new statutory proceeding, collateral" to the main action, (*Fowden v. Pacific Coast S. S. Co.*, 149 Cal. 151, [86 Pac. 178]), the parties to such collateral proceeding are determined by the notice, and jurisdiction of the parties, other than the moving party, is obtained by the service upon them of such notice. Staacke was so served by each of the parties moving for a new trial, and he did not cease to be a party to the proceeding by reason of his death after the service and filing of the notice, and before the hearing of the motion. If he was an *adverse* party, it was as necessary to serve him with notices of appeal from the orders denying the motions for new trial, as it was to serve him with notices of appeals from the judgments.

If Staacke was an adverse party, upon whom the service of notice of appeal was requisite in order to vest this court with jurisdiction, such service could not, after his death, be made upon the attorneys who had represented him in the action during his life. His death terminated the authority of the attorneys to represent him, and service of the notices of appeal upon them was not effectual so far as his interest was concerned. (*Judson v. Love*, 35 Cal. 463; *Moyle v. Landers*, 78 Cal. 99, [12 Am. St. Rep. 22, 20 Pac. 241]; *Pedlar v. Stroud*, 116 Cal. 461, [48 Pac. 371]; *Churchill v. Flournoy*, 127 Cal. 355, [59 Pac. 791]; *Estate of Turner*, 139 Cal. 85,

[72 Pac. 718].) The necessity of serving a notice of appeal upon a respondent who is an adverse party is not obviated by the death of such party. (*Judson v. Love*, 35 Cal. 463; *Moyle v. Landers*, 78 Cal. 99, [12 Am. St. Rep. 22, 20 Pac. 241]; *Pedlar v. Stroud*, 116 Cal. 431, [48 Pac. 371].) The appellant must, within the time allowed for taking an appeal, serve his notice of appeal upon all adverse parties. If any of said parties have died, service must be made upon the personal representatives of the decedent, and if the appellant is unable to procure the appointment of a personal representative, and to serve such representative within the required time, his appeal is lost. (*Williams v. Long*, 130 Cal. 58, [80 Am. St. Rep. 68, 62 Pac. 264]; *Estate of Turner*, 139 Cal. 85, [72 Pac. 718].)

The appellant Teresa Bell, as administratrix, has sought to overcome the effect of a failure to serve her notices of appeal upon Staacke or his representative by filing in this court a notice of appearance on behalf of George Henry Howard, as executor of the last will of George Staacke, deceased. This notice of appearance was filed on April 23, 1907, after the service upon the appellant of the respondent's motion to dismiss her appeals, and after the expiration of the time within which appeals could have been taken. Such voluntary appearance was not effectual to confer jurisdiction of the appeals upon this court. (*Niles v. Gonzales*, 152 Cal. 90, [92 Pac. 74].) It is no doubt true, as contended by the appellant Teresa Bell, that the appellate court may obtain jurisdiction of an appeal as well by voluntary entrance of appearance by an adverse party, as by the service of a notice of appeal upon him. (*Hibernia S. & L. Soc. v. Lewis*, 111 Cal. 519, [44 Pac. 175]; *Valley Lumber Co. v. Struck*, 146 Cal. 268, [80 Pac. 405]; *Burnett v. Piercy*, 149 Cal. 183, [86 Pac. 603].) In none of these cases, however, was the court dealing with the question of an appearance made after the time for taking an appeal had passed. The service of notice of appeal has a twofold purpose,—first, to give the appellate court jurisdiction of the person of the respondent, and, second, to give the appellate court jurisdiction of the subject-matter of the appeal. Jurisdiction of the person may be conferred by a voluntary appearance at any time, but inasmuch as jurisdiction of the subject-matter can never be conferred by

consent, the voluntary appearance by the respondent must be made within the time in which a service of notice upon such respondent would be effectual to vest jurisdiction of the appeal in the appellate court.

An "adverse party," within the meaning of section 940 of the Code of Civil Procedure, is one "whose interest in the subject-matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken." (*Senter v. Bernal*, 38 Cal. 637.) If a judgment may be modified in any manner favorable to the appellant without injuriously affecting the interest of the party not served, the appeal will not be dismissed. In such case the court will, notwithstanding the failure to serve a party, "decide the case with respect to the interests of the other parties, so far as it may be done without injuriously affecting" the interests of the party not served. (*Burnett v. Piercy*, 149 Cal. 178, [86 Pac. 603]; *Williams v. Santa Clara Min. Assoc.*, 66 Cal. 195, [5 Pac. 85].) If any of the contentions of the appellants here can be sustained without detriment to the rights of Staacke, the appeals must be retained. But such points as cannot be determined in favor of an appellant without injury to the interests of Staacke's estate must be disregarded without consideration of their merits.

One of the points urged by the appellant Teresa Bell, as administratrix, and available also, we think, to the other appellants, is that the court, in fixing the amount due to the San Francisco Savings Union on its note, erred in allowing an excessive amount of interest. A modification of the judgment, by reducing the amount to be paid to the Savings Union out of the sale of the land, could in no way injuriously affect the interests of the Staacke estate. Indeed, a reduction of the amount of the claims of the Savings Union could only be a benefit to the Staacke interest, since it would tend to lessen the possible ultimate liability of that interest on the sixty-thousand-dollar note. It may be questionable whether the point as to excessive allowance of interest arises properly on the appeals from the judgment or from the order denying a new trial. For reasons to be stated, we think that it certainly can be raised on the appeals from the judgment, and that the right of the appellants to raise it on the other appeals

also is sufficiently clear to justify the retention of those appeals as well as the appeals from the judgment.

But, while the court may review the action of the lower court in figuring interest on the sixty-thousand-dollar note, we think the judgment and order appealed from cannot be reversed, nor can it be modified in any other particular without detriment to the interests of Staacke or his estate.

The contention of the appellants Crittenden and U. S. Oil and Land Company is that Staacke held the ten-thousand-acre tract in trust solely for their predecessor, John S. Bell, and that, as such trustee, he had no power to make the deed of trust of that tract to the trustees for the San Francisco Savings Union. The effect of a reversal may be to vest the ten-thousand-acre tract in John S. Bell, free of any claim of the Savings Union. Staacke, however, as a maker of the note which is secured by the deed of trust to the trustees of the Savings Union, is directly interested in having the property applied to the payment of this note. If it should eventually be held that, as these appellants contend, the San Francisco Savings Union has no interest in the land, or that the right of its trustees to sell is barred by limitation, Staacke, or his estate, may be compelled to pay the sixty-thousand-dollar note. The estate is directly interested in avoiding this liability by maintaining the present judgment which directs the sale of the property for the purpose of satisfying this note.

Nor do the appeals of Teresa Bell, as administratrix, occupy any different position. Her contentions are, in substance, that the claim of the Savings Union, if it had any, is subordinate to the claim of the estate of Thomas Bell, and that the proceeds of any sale of the property must be applied first to the satisfaction of the claim of the Thomas Bell estate. She also contends that the right of the Savings Union and its trustees to have any affirmative relief is barred by the statute of limitations. Her success on either of these propositions would manifestly be a detriment to Staacke in his capacity as maker of the note to the Savings Union. If the Savings Union be prevented from having a sale of the property for the purpose of satisfying its note, it may be, as above stated, that Staacke's estate would become liable for such note. Or, if the proceeds of such sale be applied first to the

payment of John S. Bell's indebtedness to Thomas Bell, it may be that there will not be sufficient surplus to satisfy the claim of the Savings Union, and in this way Staacke's estate may become liable for a portion or the whole of that indebtedness. It is clear, therefore, that this judgment, in directing the sale of the property for the purpose of satisfying a claim upon which Staacke is personally liable, confers upon him a legal advantage which would be destroyed or impaired by a reversal of the judgment or the order denying a motion for a new trial. These conclusions are in no way affected by the fact, conceded by all the parties, that Staacke in borrowing the money from the San Francisco Savings Union and making a deed of trust acted, not in his own interest, but as agent for Thomas Bell, who guaranteed the note. As between him and Thomas Bell, Bell was primarily, and Staacke merely secondarily, liable. But he did by executing the note make himself personally liable to the Savings Union, which, in the event of its inability to collect the amount of its note from the land or the estate of Thomas Bell, would unquestionably be entitled to hold Staacke's estate for any deficiency. That it did not ask for any such deficiency in this action is of no consequence. It has, on the record as it here appears, the right to pursue Staacke's estate for the amount of the note, and the latter is entitled to insist that a judgment which confers upon it the advantage of having the property in question applied to the payment of any such liability shall not be set aside without its being before the court and being heard. If the necessary effect of a reversal or modification as to any party is to take away this right, the judgment and order assailed must stand as to all parties.

The affidavit offered by the appellant Teresa Bell to show that the Savings Union has not, within the time allowed for the presentation of claims, presented any claim upon this note to the executor of the will of George Staacke, cannot be considered here. The motion to dismiss for want of service on an adverse party must be disposed of on the record. (*Harper v. Hildreth*, 99 Cal. 265, [33 Pac. 1103]; *Estate of Ryer*, 100 Cal. 556, [42 Pac. 1082]; *Kennedy v. Parks*, 120 Cal. 22, [52 Pac. 40].) On that record Staacke appeared to be an adverse party, and the necessity for serving him could not be obviated by acts or omissions of other parties not appearing

in the record and occurring after the time for appeal had expired.

In the foregoing discussion we have said nothing as to the contention of the appellants Crittenden and U. S. Oil and Land Company that the court erred in denying them any priority as against the estate of Thomas Bell. It is found, however, that the action of *Bell v. Staacke*, the pendency of which was set up in the pleadings, was still pending at the time of the decision, and that the question of the relations between John S. Bell and his grantees on the one hand, with Staacke and the estate of Thomas Bell on the other, in respect of the indebtedness of John S. to Thomas Bell and of the ten-thousand-acre tract are involved in said action and "are in course of judicial determination and settlement therein." The judgment, accordingly, made no adjudication of the rights of John S. Bell and Thomas Bell (or their successors) as between each other, leaving the question of those rights to be determined in *Bell v. Staacke*. If it could be said that Staacke had no interest in this controversy as to priorities between John S. Bell and Thomas Bell, the finding as to the pending action (which is not attacked) clearly made it the duty of the court to reserve for adjudication in that action the matters therein involved. (*Cascy v. Jordan*, 68 Cal. 246, [9 Pac. 92, 305].)

There remains the question whether the amount allowed as interest on the note of the San Francisco Savings Union was excessive.

The court found that the principal of the promissory note of Staacke has not been paid, and that no interest thereon has been paid except the interest to the first day of November, 1896, and that the amount due on said note for principal and interest, to the date of the decision (March 1, 1905), is \$148,-052.52. The note, so far as is material to the present inquiry, reads as follows:—

"SAN FRANCISCO, February 1st, 1892.

"On the first day of February, 1893,—I promise to pay to the San Francisco Savings Union,—the principal sum of sixty thousand dollars. And I further promise to pay interest on said amount, at the monthly rate of two thirds of one per cent—on the first day of each and every month till

payment of the principal, the first payment to be made this day.—

“And further, I agree that in case of default in the payment of any of the amounts of principal or interest above stipulated then such amounts shall bear interest from the date of their maturity until the day of payment, at the rate of one per cent per month.— GEORGE STAACKE.”

Section 1919 of the Civil Code provides that “The parties may, in any contract in writing whereby any debt is secured to be paid, agree that if the interest on such debt is not punctually paid, it shall become a part of the principal, and thereafter bear the same rate of interest as the principal debt.” Under this section unpaid interest cannot be made to bear interest at a rate greater than that borne by the principal debt (*Savings & Loan Soc. v. Horton*, 63 Cal. 105; *Dean v. Applegarth*, 65 Cal. 391, [4 Pac. 375]); and an agreement for interest on interest at a greater rate than that so allowed by the statute is illegal and void in its entirety, and not merely as to the excess over the rate that might have been agreed upon. (*Yndart v. Den*, 116 Cal. 533, [58 Am. St. Rep. 200, 48 Pac. 618].) By the note in question the maker agrees to pay interest on the principal at the rate of two thirds of one per cent per month (eight per cent per annum) until maturity, and thereafter at the rate of one per cent per month. Overdue installments of interest are to bear interest at the rate of one per cent per month. As to installments of interest falling due before the maturity of the principal, interest on interest is fixed at a rate greater than that borne by the principal. After the maturity of the note, the rate of interest is the same for principal and unpaid interest. The provision for interest on installments falling due before maturity is therefore in conflict with the statute. This should not, however, be held to affect the validity of the agreement in so far as it provides for interest on interest falling due after maturity. Any such installments bear the same rate as the principal, and as to them there is no violation of section 1919. The provision of the note for payment of interest on unpaid installments of interest is, in its relation to section 1919, severable. In so far as it allows interest on interest at a rate greater than is borne by the principal, it is void. For the period during

which it allows interest at the same rate as the principal it is good.

In computing interest in this case, the court allowed interest on the principal from November 1, 1896 (to which date interest had been paid), to the date of the decision, at the rate of one per cent per month, and on each year's interest, so figured, at the same rate. Under the views above expressed this would, on the face of the note, have been proper, since all such interest, both on principal and interest, accrued after maturity, at a time when the note fixed interest on principal and on unpaid interest at the same rate. All interest accruing prior to the maturity of the note had been paid. As to this, the agreement was executed, and no question of the validity of such executed agreement was before the court. But it was found that on December 22, 1896, John S. Bell and George Staacke agreed with the San Francisco Savings Union that the time for the payment of the principal of said promissory note should be extended until the twenty-second day of December, 1898. This finding follows an allegation of respondents in their cross-complaint and is binding upon them. The effect of such agreement was to waive any past default in the payment of principal and to postpone the maturity of the note until December 22, 1898. Until that date there was no default in the payment of the principal, and the condition on which the rate of interest was to be increased from eight to twelve per cent per annum had not arisen. It follows that interest on interest during this period could not exceed eight per cent per annum, and as the only contract for interest on interest was for twelve per cent per annum, interest on unpaid installments prior to December 22, 1898, could not be allowed at all. The judgment was therefore excessive in allowing interest on principal at the rate of twelve instead of eight per cent per annum from November 1, 1896, to December 22, 1898, and in allowing any interest on the installments of interest that fell due during this period. The overcharge on the first of these items amounts to \$5,139.86; on the second to \$11,539.99. Inasmuch as the findings set out the terms of the note, the payments of interest, and the extension agreement, this error is apparent on the face of the judgment-roll, and can be corrected by a modification of the judgment.

For the reasons above stated, the motion to dismiss the appeals is denied. The order denying both motions for a new trial is affirmed. The cause is remanded to the lower court, with directions to modify the judgment by deducting from the amount directed to be paid to the San Francisco Savings Union the sum of \$16,679.85, and as so modified, the judgment will stand affirmed.

Angellotti, J., and Shaw, J., concurred.

Hearing in Bank denied.

[Sac. No. 1567. In Bank.—February 14, 1908.]

In the Matter of the Estate of H. J. GLENN, Deceased.
ALICE A. YOUNG, Appellant.

ESTATES OF DECEASED PERSONS—RIGHT TO DISTRIBUTION AT STATUTORY TIME.—Ordinarily a legatee, devisee, or heir is entitled as a matter of right to receive his share of the estate at the time fixed by statute, if the same can be given to him without loss to creditors, regardless of the fact that it might be better for all interested in the estate that the property should be held in administration for a longer period.

ID.—ESTOPPEL TO INSIST ON RIGHT.—A party entitled to receive a distributive share of the estate can estop himself from insisting upon the right to receive it at the time fixed by the statute where the effect thereof would be to injure the other heirs who had acted upon the faith of such party's undertaking and promises.

ID.—PARTIAL DISTRIBUTION—RIGHT TO DETERMINE BY EQUITABLE CONSIDERATIONS.—The superior court, in the exercise of its probate jurisdiction, proceeds upon principles of equity, and may refuse an application for partial distribution where the circumstances of the case show that the claimant, under settled equitable principles, should not be heard to assert the right to immediate possession of the property. In the present case, by reason of the voluntary agreements entered into between the heirs and the financial condition of the estate resulting from the carrying out of such agreements, the application for a partial distribution was rightly refused.

APPEAL from an order of the Superior Court of Colusa County refusing an application for the partial distribution of the estate of a deceased person. H. M. Albery, Judge.

The facts are stated in the opinion of the court.

Burrell G. White, for Appellant.

F. C. Lusk, for Respondents.

ANGELLOTTI, J.—This is an appeal from an order denying an application for partial distribution of appellant's share of the estate of deceased.

The petitioner is the surviving wife of A. G. Glenn, one of the children of deceased, who was entitled to an undivided one twelfth of the estate of his father. He died shortly after the death of his father, leaving a will by which he gave his interest in his father's estate to appellant for her life, the same to go upon her death to the grandchildren of his deceased father. Appellant seeks to have distributed to her this life estate in an undivided one-twelfth part of the property of the estate remaining on hand.

Deceased died intestate February 17, 1883, leaving a large estate consisting almost wholly of real property, and being very heavily indebted. It was concluded by the heirs that better results could be obtained by keeping the property in one body, without selling or distributing the same until by aid of the proceeds of the cultivation of the land, which was farming property, the indebtedness could be paid. At the request of the heirs Mr. N. D. Rideout assumed the duties of administrator with this understanding, and a written agreement was entered into by him and all of the heirs, including appellant's husband, indemnifying him against any claim on their part arising from such management by him of the property of the estate. It being necessary that the heirs should have money with which to maintain themselves pending administration, in 1888 another agreement was executed by appellant, whose husband had in the mean time died, both individually and as executrix of her husband's will, and by the other heirs, indemnifying the administrator against any claim arising by reason of advances made to them or either of them from the property of the estate. Under these agreements the property was farmed under the management of the administrator for many years, with the result that the indebtedness was very largely reduced. At the time of the

filing of this petition for partial distribution, September 7, 1906, \$495,217 had been paid to the heirs, of which last-named sum \$42,807 was paid to appellant's husband, and to her individually and as executrix of her husband's will, appellant receiving seventeen hundred dollars as late as March, 1906. Farming having become unproductive, it was concluded to sell sufficient land to pay the remaining debts and an order of sale was obtained. Some land was sold, but the administrator had not been able at the time of the hearing of this petition to sell enough to pay the debts of the estate. At the time of such hearing the assets of the estate consisted of real estate appraised at \$510,311, money due on real estate sold, \$5,000, and grain valued at \$7,000, and there was due creditors of deceased \$54,640, due for administrator's commissions according to minimum estimate \$50,000, and due for taxes \$11,000, a total of \$115,640. It sufficiently appeared that every reasonable effort was being made to sell enough land to pay the debts, and the indications were that sufficient could be sold to discharge the indebtedness within a year.

The first demand on the part of appellant that advances to the heirs cease and that the estate be closed was made in August, 1905. The granting of the petition for partial distribution was opposed by the administrator and all of the heirs other than appellant.

It is apparent that the granting of the petition would have been exceedingly injurious to the heirs, and would have postponed the payment of the claims of the creditors of the estate. Contemplated sales of land absolutely necessary to the payment of debts and the closing of the estate would probably have been prevented, and certainly very much delayed, and unless a partition was had, which, in the ordinary course of things, would have involved large expense and delay, the inability of the estate to convey to purchasers an absolute title including all interests would naturally have caused the remaining undivided interests to be sold at great loss. The record amply justified the conclusion of the learned trial judge that it was not then for the best interests of the estate and those interested in it that this undivided interest should be distributed to appellant. Appellant, however, insists that this is an immaterial consideration upon an application for partial distribution, the statute providing that if at the hearing "it

appear that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court must make an order in conformity with the prayer of the petition." Her position is that the facts stated show as a matter of law that the estate was "but little indebted" (*Estate of Crocker*, 105 Cal. 372, [38 Pac. 954]), and that the distribution asked might have been made without loss to the creditors, and that consequently the lower court was required by the terms of the statute to grant the application, however injuriously the other heirs might have been affected thereby. Assuming purely for purposes of argument that the facts showed the estate to be "but little indebted" within the meaning of the statute, and that no loss to creditors would have resulted from the granting of the application, we do not think that the result contended for by appellant follows. Ordinarily it is, of course, true that a legatee or devisee or an heir is entitled as a matter of right to receive his share of the estate at the time fixed by the statute, if the same can be given to him without loss to creditors, regardless of the fact that it might be better for all interested in the estate that the property should be held in administration for a longer period. It is his property, and he has the right to enjoy the same at the earliest possible moment consistent with the proper administration of the estate. That he shall be able to have such enjoyment is the object of our statutes relative to partial distribution. But we have no doubt that a party can estop himself from insisting upon the exercise of this right where the effect thereof would be to injure the other heirs who had acted upon the faith of such party's undertaking and promises. It is well settled that the superior court, in the exercise of its probate jurisdiction, proceeds upon principles of equity (see, *In re Moore*, 96 Cal. 528, [31 Pac. 584]), and we see no reason why it may not deny an application for partial distribution where the circumstances of the case show that the claimant, under well-settled equitable principles, should not be heard to assert the right to immediate possession of the property. In the case before us the circumstances which would render the granting of appellant's application injurious to all the other heirs are the result of the agreements freely entered into by appellant and her husband, under which they have already received by

way of advancement \$42,807. If it had not been for these agreements, the estate would long ago have been closed, and appellant would have received her share thereof. By reason thereof, those interested in the estate find themselves in a position where it is necessary to sell a large portion of the realty in order to pay the debts and close the estate. Appellant chose that moment to insist upon the right of immediate delivery of her undivided share thereof, notwithstanding that the enforcement thereof will result in injury to all the other heirs. We think that the court below was warranted in holding that she could not insist upon this right to the injury of the other heirs, while those managing the estate were making every reasonable effort to close the administration, and there was a reasonable probability that if the estate was kept intact, sufficient property could be sold within a very short time to pay all the debts and expenses of administration, and thus enable final distribution to be made.

In view of what we have said, it is apparent that certain evidence objected to by appellant was relevant and was properly admitted.

The order is affirmed.

Shaw, J., McFarland, J., Henshaw, J., Lorigan, J., and Sloss, J., concurred.

[L. A. No. 1915. Department Two.—February 15, 1908.]

B. R. DAVISSON, Respondent, v. EAST WHITTIER LAND AND WATER COMPANY, Appellant.

ACTION BY CONTRACTOR—COUNT FOR LABOR DONE AND MATERIALS FURNISHED—SUPPORT OF FINDING AND JUDGMENT.—In an action by a contractor to recover upon a first count for labor done and materials furnished by plaintiff's assignor in constructing and laying pipelines and building concrete boxes for defendant, *held* that there is sufficient evidence to support a finding for plaintiff on that count, notwithstanding conflicting evidence to the contrary, and the judgment rendered thereupon will be affirmed.

ID.—SECOND COUNT FOR EXTRA WORK—PROVISION FOR ARBITRATION—CONDITION PRECEDENT.—In respect of a second count in the complaint. —
CLIII Cal.—6

plaint for extra work, where the contract contains a provision that "should any dispute arise respecting the true value of the extra work done, . . . the same shall be valued by two competent persons, one employed by the owner, and the other by the contractor, and in case they cannot agree, these two to have power to name an umpire, whose decision shall be binding on all parties," such arbitration, or an unsuccessful attempt to secure the same, is a condition precedent, without which the count for extra work and a judgment thereupon cannot be sustained.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order refusing a new trial. Walter Bordwell, Judge.

The facts are stated in the opinion of the court.

Harris & Swanwick, and Hunsaker & Britt, for Appellant.

John E. Daly, E. W. Freeman, and A. D. Laughlin, for Respondent.

THE COURT.—This is an action to recover the sum of \$1,272.91 with interest upon the first count, for labor done and materials furnished by plaintiff's assignor in constructing and laying pipe-lines and building concrete boxes for the defendant corporation in the county of Los Angeles, for use in connection with its irrigating works; and upon the second count, to recover the further sum of \$9,467.47, with interest, alleged to be due for similar work and materials furnished by plaintiff, principally in the construction of certain lateral pipe-lines in said county of Los Angeles and the county of Orange, for the defendant corporation. Judgment was rendered in the superior court in favor of plaintiff for the sum of four thousand dollars with interest and costs, and from the said judgment and an order refusing a new trial the defendant corporation appeals. The said sum of four thousand dollars, for which the trial court rendered judgment, comprises the full amount prayed for in the first count of the complaint, to wit,—the sum of \$1,272.91, and the further sum of \$2,727.09, awarded by the court upon the second count of said complaint, which was for extra work.

Several questions are involved in this appeal, which will be considered *seriatim*, as follows:—

1. Upon the first count in the complaint the finding of the trial court is as follows: "That between the first day of November, 1903, and the 11th day of March, 1904, plaintiff and J. F. Smith furnished materials and performed labor for the defendant at its special instance and request in constructing pipe-lines, building concrete boxes, and in laying and completing certain pipe-lines for the defendant in the county of Los Angeles, aforesaid, and that the defendant promised and agreed to pay to the plaintiff and said Smith therefor the sum of \$1,272.91; that no part of said sum has been paid. . . . That plaintiff is entitled to judgment against defendant for the amount of said sum of \$1,272.91," etc.

In our opinion appellant's contention that the above finding is not supported by the evidence cannot be maintained. Appellant claims that the sum of \$1,272.91 awarded plaintiff by this finding was included in a payment of five thousand dollars made to the plaintiff by Mr. Stowell, an officer of the defendant company, on May 14, 1904. The plaintiff testifies on cross-examination as to this matter as follows:—

"I received eleven thousand three hundred and sixty-six dollars and eighty-two cents, which has been paid on the second cause of action at various times. It was not received all in one payment. The last payment of five thousand dollars was on May 14th, 1904. November 18th, 1903, I received five thousand dollars. This payment was for the second cause of action. I received the money from Mr. Stowell." The plaintiff might have gone further in his testimony on this subject, but this clear cut and positive statement will at least bring the case within the rule of this court that a finding will not be disturbed when there is a substantial conflict in the evidence, and is sufficient to sustain the finding of which the appellant complains.

2. Counsel for appellant contends that the plaintiff is not entitled to maintain his action as far as the second count of his complaint is concerned, and in that connection invokes the following provision contained in the contract annexed to and made a part of the defendant's amended answer to the complaint, and found by the court:

"Should any dispute arise respecting the true value of the extra work done, or works omitted, the same shall be valued by two competent persons, one employed by the owner and the

other by the contractor, and in case they cannot agree, these two to have power to name an umpire, whose decision shall be binding on all parties."

In view of the conclusion at which we have arrived after a careful examination of the entire record, the effect of this provision becomes the most important matter remaining for consideration on this appeal. It becomes necessary, therefore, to determine the effect of the provision above set forth as to the valuation by arbitration of the extra work done. In *Holmes v. Richet*, 56 Cal. 307, [38 Am. Rep. 54], the contract before the court was practically identical, word for word, with the one here involved. After a review of the authorities, Morrison, C. J., says:—

"In view of the foregoing authorities, and the principle they announce, (which we believe to be correct), no right of action accrued to the contractor for the extra work done by him, until the same was valued, or some good and sufficient excuse for a failure to value the same in accordance with the agreement was shown. In this case no valuation was made, and no reason is shown for a failure to make such a valuation. We are, therefore, of the opinion that the contractor was not entitled to recover anything for extra work." The syllabus in *Holmes v. Richet*, 56 Cal. 307, [38 Am. Rep. 54], also contains a clear and concise statement of the legal principle contained in the opinion, which applies to the case at bar, as follows:—

"It now seems to be the settled law, that an agreement to refer a case to arbitration will not be regarded by the courts, and they will take jurisdiction and determine a dispute between parties, notwithstanding such agreement. But when the agreement is, that the covenantor shall pay such sum, and only such sum, as shall be determined by arbitrators, the procuring an award is as clearly a condition precedent to an action as if the parties had expressly so provided. So held, with reference to a contract for the construction of a building in which it was agreed, that should any dispute arise regarding the value of extra work, the same should be valued by arbitrators. . . . The distinction between the two classes of cases stated is, that in the former the parties undertake by an independent covenant or agreement to provide for an adjustment and settlement of all disputes and differences, to the exclusion of the courts; and in the latter, they merely, by the same agreement which creates

the liability and gives the right, qualify the right, by providing that, before any right of action shall accrue, certain facts shall be determined, or amounts and values ascertained; and this is made a condition precedent, either in terms or by necessary implication." (See, also, *Loup v. California Southern R. R. Co.*, 63 Cal. 103; *Scammon v. Denvo*, 72 Cal. 398, [14 Pac. 98]; *Tally v. Parsons*, 131 Cal. 516, [63 Pac. 833]; *Roche v. Baldwin*, 135 Cal. 522, [65 Pac. 459, 67 Pac. 903].) It may be said that, in the last case cited, Mr. Justice Henshaw filed a dissenting opinion, and Mr. Justice McFarland also dissented; but it should be stated that the facts presented in *Roche v. Baldwin* were widely at variance with those in the case at bar. In the former case the making of the agreement as to compensation was squarely denied and absolutely repudiated by Mr. Highton, the plaintiff's assignor. In the case at bar the record contains no showing whatever of any attempt upon the part of plaintiff to procure an award in conformity with the terms of the contract, prior to the bringing of his action, or at any other time, nor do counsel for the plaintiff and respondent mention the matter in any way in their brief replying to the argument of appellant. We are of the opinion, therefore, that the judgment should be reversed as to the amount awarded on the second count of the complaint, to wit, the sum of \$2,727.09.

3. In view of the foregoing conclusions it is not necessary to discuss the remaining points made by counsel. It may be proper to state, however, that the judgment in favor of plaintiff is too great by the sum of one thousand dollars as shown by the judgment-roll, the mistake having occurred in the subtraction of the amount which the trial court found had been paid by the defendant, to wit, the sum of \$11,366.82, from the amount found to be the reasonable value of materials furnished and labor done, to wit, the sum of \$13,093.91, which difference or balance the court found to be the sum of \$2,727.09, whereas it is plain that it should have been \$1,727.09. However, this matter becomes immaterial in view of the conclusions we have reached; and, for the purpose of the present appeal, the same may be said of the contention raised by counsel as to the divisible nature of the contracts involved in the action, and the question as to whether the evidence in the trial court was sufficient to warrant the findings.

It is to be observed that this action was not brought to enforce a mechanic's lien, and that neither the action nor the defense is based, in any respect, on the Mechanics' Lien Law.

For the foregoing reasons the judgment appealed from is affirmed as to the amount involved in the first count of the complaint, to wit: the sum of \$1,272.91, and interest thereon at the rate of seven per cent per annum from July 29, 1905, and reversed as to the sum of \$2,727.09, awarded to plaintiff upon the second count of the said complaint. The order refusing to grant a new trial is affirmed as to the first count of the complaint, and is reversed as to the second count. The cause is remanded for a new trial as to the last count, the appellant to recover costs on this appeal.

Hearing in Bank denied.

[L. A. No. 1941. In Bank.—February 18, 1908.]

GASPAR A. HUFFNER et al., Respondents, v. F. R. SAWDAY et al., Appellants.

PLEADING—DEMURRER—UNCERTAINTY IN COMPLAINT.—The overruling of a demurrer to a complaint on the ground of uncertainty affords no ground for a reversal when it is apparent from the record that the defendants were not thereby misled or embarrassed in making their defense.

WATER-RIGHTS — RIPARIAN PROPRIETORS — OCCASIONAL DRYNESS OF STREAM—CHANGE OF CHANNEL.—The facts that the bed of a stream does not at all seasons of the year carry a flowing body of water, and that the location of the channel of the stream is subject to change, are not inconsistent with the existence of a natural watercourse, nor do they deprive those owning land fronting on the bed of the stream of the character of riparian proprietors.

ID.—RIPARIAN PROPRIETOR—INJUNCTION—INJURY NEED NOT BE SHOWN.—The right of a riparian proprietor to restrain the diversion by others than riparian owners of water which would, if undisturbed, flow past his lands does not rest upon the extent to which he has used the water, nor upon the injury which might be done to his present use. Even if a riparian proprietor has never made any use of the water flowing past his land, he has the right to have it continue in its customary flow, subject to such diminution as might result from reasonable use by other riparian proprietors. This is a

right of property, a part and parcel of the land itself, and the riparian proprietor is entitled to have restrained any act which would infringe upon such right.

ID.—APPROPRIATOR MUST SHOW INJURY TO RESTRAIN DIVERSION.—One entitled to a water-right in a stream which is based upon prior appropriation and use cannot restrain a diversion of the waters of the stream without showing that the diversion would diminish the flow of water which he had been receiving for use.

ID.—INADEQUATE SUPPLY OF WATER—CONTINUITY OF USE.—The fact that an appropriator of water, for several years prior to the commencement by him of an action to restrain an unauthorized diversion, by reason of the dryness of the seasons, had not been able to get as much water as theretofore did not destroy the continuity of his use, nor deprive him of the right to use the amount formerly diverted in the event that the flow of the stream should again furnish such amount.

ID.—DIMINISHED SATURATION OF BED OF STREAM.—The diversion of water from the upper portion of a stream, the natural effect of which is to prevent or diminish the saturation of the sandy bed underlying the stream and thereby materially postpone the time when a surface flow would come to the lands of a lower appropriator, is a material injury to such lands.

ID.—INJUNCTION AGAINST DIVERSION—RIGHT TO FLOOD WATERS.—Defendants who have been enjoined at the instance of riparian proprietors and appropriators from diverting any of the waters of a stream cannot complain of the judgment, which was otherwise correctly rendered, merely because it did not specifically reserve to them a right to the flood waters of the stream, when no such right was asserted in their answer.

ID.—JUDGMENT—RETURN OF WATER TO STREAM.—A decree enjoining the unlawful diversion of the waters of a stream at the instance of lower riparian proprietors and appropriators is not erroneous in failing to permit the diversion on condition that the water was returned to the stream above the plaintiffs' land undiminished in its natural flow, when there is evidence showing that such a return would have been a physical impossibility.

APPEAL from a judgment of the Superior Court of San Diego County and from an order refusing a new trial. E. S. Torrance, Judge.

The facts are stated in the opinion of the court.

W. R. Andrews, and Collier, Smith & Holcomb, for Appellants.

V. E. Shaw, and Shaw & Winnek, for Respondents.

SLOSS J.—This is an action to enjoin the defendants from diverting water from a stream known as the San Pasqual River. The plaintiffs recovered judgment, and the defendants appeal from the judgment and from an order denying their motion for a new trial.

The complaint sets forth two counts or causes of action. Each of the counts alleges that the San Pasqual River is a stream arising in the Volcan Mountains in San Diego County, whence it flows in a westerly course through the San Pasqual Valley to the Pacific Ocean; that the plaintiffs are respectively, owners of seventeen several parcels of land in the San Pasqual Valley, each of which is irrigable and in cultivation, and that said plaintiffs and their predecessors have, for more than thirty years, cultivated their land by means of water taken from said stream, which furnishes the only means of irrigating these lands. It is alleged that the defendants assert the right to, and, unless restrained, will divert at a point about twenty-five miles above plaintiffs' lands, the waters of the stream to the extent of three thousand inches, and that, if the defendants are permitted to make this diversion, each of the plaintiffs will be deprived of water for irrigation.

The foregoing averments are, as has been said, common to both counts. The first contains the further allegation that the San Pasqual River in its natural course flows over, through and along each of the tracts described as belonging to the various plaintiffs, and that the defendants' asserted right of diversion is based upon a notice of appropriation, according to which the water is to be used upon land situated outside of the watershed tributary to San Pasqual River. The second count alleges, in addition to what has been stated, that twenty-five hundred inches of water are required to properly irrigate the lands belonging to the plaintiffs, and that, in order to obtain such supply, the plaintiffs and their predecessors did, prior to 1878, appropriate from the waters of the stream, twenty-five hundred inches, and they have ever since diverted all the water flowing in said stream up to twenty-five hundred inches, and conducted the same upon their several tracts, for use therein. It is further alleged, in the second count, that the water in the stream at plaintiffs' point of diversion rarely exceeds two thousand inches, and during most of the irrigating season is less than one thousand inches.

It will be seen that the plaintiffs rely upon two different grounds of objection to the proposed diversion by defendants. In the first count they stand upon their right as riparian proprietors; in the second count they assert a claim as prior appropriators. It may be said at this point that no error was committed in overruling the demurrer to the complaint. The sufficiency of each count to state a cause of action was not, and is not now, questioned. The only points made are that the complaint is uncertain in some particulars. We think the pleading is not open to the objections raised, but even if it were, it is apparent from the record that the defendants were not thereby misled or embarrassed in making their defense, and the overruling of the demurrer would therefore afford no ground for reversal. (*Gassen v. Bower*, 72 Cal. 555, [14 Pac. 206]; *Alexander v. Central L. & M. Co.*, 104 Cal. 532, [38 Pac. 410]; *Rooney v. Gray Brothers*, 145 Cal. 753, [79 Pac. 523].)

The answer denies all the allegations of each count, except as to the source of the San Pasqual River and the assertion by defendants of the right, and their intention to take and divert three thousand inches of the waters of the stream, as alleged by plaintiffs. The defendants also plead a separate defense, in which they allege that they hold, pursuant to the mining laws of the United States, certain placer mining claims, of the value of over one million dollars. That it is necessary, in order to work these claims, to take the waters of the stream to the extent of three thousand inches. It is further averred that on April 8, 1893, they posted at the proposed point of diversion a notice of appropriation of the waters of the San Pasqual River to the extent aforesaid, in accordance with the provisions of section 1415 of the Civil Code, that they duly recorded their notice, commenced the construction of their ditch and tunnel within sixty days after posting their notice, and have ever since continued such construction diligently and uninterruptedly, the work already done being of the value of twenty-five thousand dollars and amounting to three-fourths of the work necessary to be done. It is alleged that this work was done by the defendants in good faith and with the acquiescence and consent of plaintiffs. The answer further alleges that six sevenths of the water of the watershed flows into the stream below defendants' point of diversion, and that

the stream flows on the surface "only during times of flood and immediately thereafter, at all of which times there is sufficient water to supply the plaintiffs fully and adequately without taking or requiring any of the waters claimed by defendants."

The court found that the San Pasqual River is a watercourse as alleged in the complaint; that the plaintiffs are the owners of the respective tracts claimed by them; that ten of the seventeen holdings described in the complaint border upon the stream. It is found that the plaintiffs' lands have been irrigated from the stream for twenty-five years, and would be of little value without irrigation. The findings declare that for the past eight years the entire flow of the stream has been inadequate to irrigate the lands of the plaintiffs, and that if the defendants are permitted to divert the waters from the stream, each of the plaintiffs will be deprived of water for irrigating his tract of land and will suffer irreparable loss and damage. The court found that the defendants had posted and recorded their notice of appropriation, and had performed the work as alleged in their answer, but had not prosecuted the same diligently. The place to which the defendants claim the right to take the water is found to be on a different watershed from that tributary to the San Pasqual River. There is a finding against the plea of acquiescence and consent on the part of the plaintiffs. The judgment decrees that the defendants have no right or title to the waters of the San Pasqual River, and no right to divert the same, and perpetually enjoins them from taking or diverting from the river any of the waters of the stream, or in any manner whatsoever interrupting, obstructing, or interfering with the free, usual, or customary flow of water down or through said stream.

Many of the findings are attacked as unsupported by the evidence. In connection with the finding of the existence of a watercourse as alleged, attention is called to evidence that the San Pasqual River does not, at all seasons of the year, carry a flowing body of water through the San Pasqual Valley, in which the plaintiffs' lands are situated, and that the location of the river bed or channel is subject to change. It appears that in this valley the stream is dry during the summer months, and that its surface flow begins, in years of ordinary rainfall, about the end of November, and ceases in June. The soil is

sandy, and the river bed "varies greatly and changes often," as stated by a witness for the plaintiffs. These circumstances are not inconsistent with the existence of a watercourse, nor do they deprive those owning land fronting on the bed of the stream of the character of riparian proprietors. (*Lux v. Haggin*, 69 Cal. 255, 417, 418, [4 Pac. 919, 10 Pac. 674]; *Spangler v. San Francisco*, 84 Cal. 12, [18 Am. St. Rep. 158, 23 Pac. 1019]; *Los Angeles Cemetery Assoc. v. City of Los Angeles*, 103 Cal. 461, [37 Pac. 375].)

Finding 15, to the effect that a large part of each of the tracts described in the complaint has for twenty-five years been continuously cultivated by means of water taken from the stream is, it is contended, contrary to the evidence. The finding on this point is, so far as concerns the plaintiffs who have riparian rights, not material. Their right to restrain the diversion, by others than riparian owners, of water which would, if undisturbed, flow past their lands, does not rest upon the extent to which they have used the water, nor upon the injury which might be done to their present use. Even if these plaintiffs had never made any use of the water flowing past their land, they had the right to have it continue in its customary flow, subject to such diminution as might result from reasonable use by other riparian proprietors. This is a right of property, a "part and parcel" of the land itself (*Duckworth v. Watsonville W. & L. Co.*, 150 Cal. 520, [89 Pac. 340]), and plaintiffs are entitled to have restrained any act which would infringe upon this right. In *Southern California I. Co. v. Wilshire*, 144 Cal. 68, [77 Pac. 767], the court said: "It is not necessary in such cases for the plaintiff to show damage, in order that it may be entitled to a judgment. It is enough if it appears that the continuance of the acts of the defendants will deprive it of a right of property, a valuable part of its estate. The taking of the water beyond the watershed would, therefore, be an injury to the plaintiff's riparian right which, under the pleadings and findings in the case, the plaintiff was entitled to have enjoined." In *Stanford v. Felt*, 71 Cal. 249, [16 Pac. 900], it is said: "Nor is the owner lower down the stream required to show, in order to procure an injunction, any actual present damage. The diversion, by lapse of time, may grow into a right. To prevent such result, an injunction will be awarded."

These and other authorities to the same effect are reviewed in *Anaheim Union Water Co. v. Fuller*, 150 Cal. 327, [88 Pac. 978], in which the doctrine is reasserted.

In so far, however, as the rights of the plaintiffs rest upon prior appropriation and use, it was no doubt necessary for them to show that the proposed diversion would diminish the flow of water which they had been receiving for use upon their lands. That a part of the lands of each of the plaintiffs had been, for many years, irrigated by means of water taken from the stream whenever the supply of water permitted was fully shown by the evidence. The last seven years preceding the trial of the action had been exceptionally "dry," and during them the flow of water had ceased earlier in the spring than in former years. The fact that during this period the plaintiffs had not been able to get as much water as theretofore did not destroy the continuity of their use, nor deprive them of the right to use the amount formerly diverted in the event that the flow of the stream should again furnish such amount. It is urged that there is no evidence to support the finding that the proposed diversion by defendants would cause irreparable damage or loss to plaintiffs. But the plaintiffs offered evidence to show that during the seven or eight years preceding the trial, the flow of water in the stream had been so light that there was no surface flow at the lower end of the valley. One of defendants' witnesses testified that nobody in the San Pasqual Valley "gets plenty of water for irrigation." It is apparent that if, as matters now stand, the plaintiffs are unable to get from the stream all the water they need (and claim to be entitled to), they will be damaged, if defendants are permitted to divert, at a higher point, three thousand inches of the water of the stream. It is true that there is evidence to the effect that during the summer months, when the stream is dry in the San Pasqual Valley, there is some water running at the defendant's point of diversion. It does not follow, however, that the taking of this water would not injure the respondents. There are long stretches of sandy bottom between the defendants' proposed works and the lands of the plaintiffs. Water flowing over the rocky bed above sinks into the sand, which must become saturated before there can be a flow over its surface. To so fill this sand requires, as witness testifies, several weeks. The court was justified in drawing from this testi-

mony the inference that an interruption to the flow of this water would prevent or diminish the saturation of the sandy bed underlying the stream and thereby materially postpone the time when a surface flow would come to plaintiffs' lands. Such postponement would be a clear injury to the plaintiffs, whose interest in the waters of the stream included the right to have the river bed continue to hold sufficient water to supply and support the surface stream in its natural state. (*Los Angeles v. Pomeroy*, 124 Cal. 621, [57 Pac. 585]; *McClintock v. Hudson*, 141 Cal. 275, [74 Pac. 849]; *Cohen v. La Cañada Co.*, 142 Cal. 437, [76 Pac. 47]; *Verdugo Cañon Water Co. v. Verdugo*, 152 Cal. 655, [93 Pac. 1021], filed Jan. 23, 1908.)

The appellants make the further point that they are restrained from taking any of the water of the stream, although the evidence shows that, in times of flood, large quantities of water, far exceeding any amount that can be used by the plaintiffs, passes down the stream. It has been held that an injunction will not issue to restrain a diversion of water during times of extraordinary floods where such diversion will not perceptibly diminish the stream below. (*Edgar v. Stevenson*, 70 Cal. 286, [11 Pac. 704]; *Heilbron v. 76 Land and Water Co.*, 80 Cal. 189, [22 Pac. 62]; *Fisfeld v. Spring Valley W. W.*, 130 Cal. 552, [62 Pac. 1054].) But the pleadings in this case raise no issue as to the right to take flood waters. The answer contains an allegation (hereinbefore quoted) with reference to the flow of the stream during times of flood, but the purpose of this allegation was, not to claim the flood waters for defendants, but to limit the plaintiffs to the surplus of flood waters remaining after the defendants had taken the three thousand inches claimed by them. As was said in *Anaheim Union Water Co. v. Fuller*, 150 Cal. 327, [88 Pac. 978], "The defendants do not propose to limit the diversion to times of high water, but, on the contrary, they will take it during the time of its greatest scarcity. There is no question of the diversion of flood water involved in the case. The right which they assert is to take the ordinary water of the stream." It may be questioned whether the decree, properly construed, purports to deal with anything beyond the ordinary flow of the stream. But, in any event, the appellants are not in a position to complain that the court did not in specific terms reserve to them a right which they had not asserted.

The point is made that the decree should have permitted the defendants to divert the water, on condition that they returned it to the river above plaintiffs' lands, no less diminished than it would have been in its natural flow to the point of return. It may be that a decree so limited would have been proper if the evidence had shown that the defendants were able and willing to make such return of the water. (*Gould v. Eaton*, 117 Cal. 539, [49 Pac. 577]; *Montecito Valley Co. v. Santa Barbara*, 144 Cal. 578, [77 Pac. 1113].) But here there was testimony from one of the defendants themselves that the water if diverted would return to the San Pasqual Valley through the Santa Maria Creek, and evidence was introduced to show that this creek joins the San Pasqual below the lands of the plaintiffs. If, as the trial court had the right to believe, this was the true state of facts, there was no way in which the defendants could divert the water claimed by them without injury to the plaintiffs.

The findings already discussed lead to the conclusion that the plaintiffs, whether as riparian proprietors or as prior appropriators of all the waters ordinarily flowing in the stream, had a right superior to that of the defendants, even if the latter did everything required under the statute to constitute a valid appropriation. There is no occasion, therefore, to consider whether the evidence justified the finding that the defendants had failed to prosecute their work diligently. If the finding on this point had been in their favor, it would not have enlarged the rights of the appellants.

The judgment and order are affirmed.

Shaw, J., Angellotti, J., Lorigan, J., and Henshaw, J., concurred.

[L. A. No. 1978. Department Two.—February 24, 1908.]

FIRST NATIONAL BANK OF REDLANDS, Appellant, v.
GERTRUDE S. BOWERS, Respondent.

**GUARANTY TO BANK—PERCENTAGE OF ALL DRAFTS BY FRUIT COMPANY
—BILLS OF LADING—ORANGE SEASONS—EXPLANATORY EVIDENCE.—**

A guaranty by the defendant to a bank of ninety per cent of all drafts drawn thereupon by a fruit company, with bills of lading attached, during two orange seasons, is not so plain and unambiguous upon its face that evidence is not admissible in explanation of it.

ID.—SUFFICIENCY OF EXPLANATION—SUPPORT OF VERDICT FOR DEFENDANT.—*Held*, that the explanatory evidence introduced by the defendant to show that the guaranty was not of ninety per cent of each draft drawn, but that the bank in allowing the fruit company to draw ninety per cent of each draft was to retain the surplus as a security fund to the end of each fruit season, and that she was only to be liable for ninety per cent of the face of all drafts drawn during the season, was sufficient, if believed by the jury, to support a verdict for the defendant.

APPEAL from a judgment of the Superior Court of San Bernardino County and from an order denying a new trial. Frank F. Oster, Judge.

The facts are stated in the opinion of the court.

Gregg & Surr, and J. S. Chapman, for Appellant.

Curtis & Curtis, and Hunsaker & Britt, for Respondent.

THE COURT.—The facts touching the controversy between these parties will be found elaborately set forth in the opinion of this court upon a former appeal. (*First National Bank v. Bowers*, 141 Cal. 253, [74 Pac. 856].) Upon the first trial the lower court construed the guaranty given by defendant to plaintiff as being so free from doubt as not to call for or permit the introduction of evidence touching the circumstances of its execution in explanation of it, and held, in accordance with the contention of defendant, that the guaranty of "ninety per cent of the face of all drafts for oranges with bill of lading attached" meant that such bills of lading as accompanied the drafts should have been transferred to the

bank by the Haight Fruit Company, so as to operate as a pledge of the oranges and as security for the benefit of the guarantor, and by such transfer to place the consignment under the absolute control of the bank and beyond the control of the fruit company; that this was a condition precedent to her liability under the guaranty, and not having been complied with, such liability never attached. (*First National Bank v. Bowers*, 141 Cal. 258, 259, [74 Pac. 856].) Upon appeal this court held that the wording of the guaranty was not so plain, unambiguous, and certain, as to have justified the court in refusing evidence explanatory of it.

A new trial was had before a jury and such evidence was introduced. The verdict of the jury, followed by the judgment of the court, was in favor of the defendant. Plaintiff's brief upon appeal is devoted in great part to an analysis and criticism of the evidence of the defense and to attacks upon the instructions given by the court. It would be impossible, within the limitations of a judicial opinion, to discuss these matters *seriatim*. Mrs. Bowers's plea and evidence were in accord with the construction which, as above stated, the trial court in the first instance put upon the instrument of guaranty. The testimony in effect was that it was represented to her by the president of the bank that the bill of lading operated to give the bank control of each shipment of oranges; that she had no knowledge that the fruit company could divert these shipments and obtain money for them as they did, notwithstanding the bill of lading held by the bank. She testified that the guaranty was drawn by one of the bank officials after presentation by her to that official of a form of guaranty prepared by her brother; that the form of guaranty prepared by her brother contained a provision whereby the bank, allowing the Haight Fruit Company to draw ninety per cent of the face of each draft, was to retain the surplus as a security fund to the end of the season, and that she was thus liable for only ninety per cent of the face of all drafts drawn during the season, and not for ninety per cent of the face of each and every draft; that the bank official, who prepared the guaranty which she actually signed, declared to her that it was in all essential particulars identical with that which she presented for his approval, and that under this representation she executed the guaranty in question. This evidence, believed

by the jury, as from their verdict it was, justifies the judgment of the court, which judgment and the order denying plaintiff's motion for a new trial are, therefore, affirmed.

[Sac. No. 1588. In Bank.—February 24, 1908.]

EMMA J. MACLEOD, Appellant, v. JOE MORAN et al.,
Respondents.

HOMESTEAD—DEED OF TRUST TO SECURE DEBT NOT AN ABANDONMENT.—

Where a homestead has been regularly selected the subsequent execution of a deed of trust by the husband and wife to secure the payment of a debt, though in the form of a grant, is not a "grant" within the meaning of section 1243 of the Civil Code providing the manner for the abandonment of the homestead, but is practically and substantially a mortgage with a power of sale, and does not constitute an abandonment of the homestead.

ID.—EFFECT OF LEGAL TITLE IN TRUSTEES.—In such case the legal title in the trustees is conveyed solely for the purpose of security, and carries no other incident of ownership than the right to convey upon default, but leaves a legal estate in the trustor or his successors as against all persons other than the trustees and those lawfully claiming under them.

ID.—HOMESTEAD MAY BE SELECTED AFTER DEED OF TRUST.—A trustor in possession may select as a homestead property covered by a deed of trust to secure his debt.

ID.—EFFECT OF PAYMENT OF DEBT—CESSATION OF ESTATE OF TRUSTEES—TITLE OF RECORD COMPELLABLE.—Upon the payment of the debt secured by a deed of trust the estate of the trustees absolutely ceases, leaving in them nothing but the bare legal title of record, which they may be compelled to reconvey to the owner to make the record title clear. The reconveyance is no part of the execution of the trust.

ID.—CONSTRUCTION OF CLAUSE IN DEED OF TRUST—ABANDONING HOMESTEAD.—A clause in a deed of trust to secure a debt purporting to abandon all right of homestead is to be construed only as an abandonment to the trustees for the purposes of the trust, and not as divesting the homestead right absolutely. No such express abandonment to the trustees was necessary to enable them to convey the whole property free of claim of homestead to a purchaser at a trustees' sale had in execution of the trust, and the express abandonment can have no further effect.

APPEAL from a judgment of the Superior Court of San Joaquin County. Frank H. Smith, Judge.

The facts are stated in the opinion of the court.

Plummer & Dunlap, for Appellant.

O. B. Parkinson, Jacobs & Flack, and R. L. Beardslee, for Respondent.

ANGELLOTTI, J.—The only question presented by this appeal is whether a certain trust-deed executed by plaintiff and her husband, A. K. MacLeod, for the purpose of securing the payment of a debt, constituted an abandonment of a homestead theretofore regularly selected by the plaintiff in accord with the provisions of the Civil Code relative to the selection of homesteads. The trial court held that such was the effect of the trust-deed, and gave judgment against plaintiff, and this is an appeal by plaintiff from such judgment.

The real property involved was community property, having been acquired by plaintiff's husband, A. K. MacLeod, after their marriage and by their joint efforts, and was their family home. It was regularly selected as a homestead by plaintiff on May 3, 1902. In January, 1904, the deed of trust was executed and acknowledged by plaintiff and her husband, and recorded in the office of the county recorder. By this instrument, the husband and wife purported to grant, bargain, sell, etc., the land in question to M. L. Sims and C. L. Flack in trust, as security for the payment of four hundred and fifty dollars with interest, to one Mary E. Sims. The trust-deed was in the form ordinarily used for such instruments when given as security for the payment of a debt, authorizing the trustees, among other things, to sell the property at public auction in the event of default in the payment of principal or interest, to execute and deliver a deed on such sale, and to appropriate such portion of the proceeds of sale as was necessary to the payment of the debt and costs. It was provided therein that if the makers of the deed paid at maturity all sums secured thereby, the trustees "shall reconvey all the estate in the premises aforesaid to them by this instrument granted unto the said A. K. MacLeod, or his assigns, at his

request and cost." Immediately following the description by metes and bounds of the property conveyed, was the following: "And also all the estate, interest, claim and demand, as well in law as in equity, which the said parties of the first part may have or may hereafter acquire of in and to the said premises, with the appurtenances, hereby expressly abandoning all right of homestead in and to said premises." On March 23, 1904, there was executed and acknowledged by the trustees and recorded, a reconveyance of the property to said A. K. MacLeod, it being recited therein that all the indebtedness secured by the deed of trust had been paid. On the same day said A. K. MacLeod executed and delivered a deed of conveyance purporting to convey the property to one Edward Studivan, but plaintiff did not join therein. Subsequently, Studivan executed and delivered to defendant Joe Moran a quitclaim deed of the property. Plaintiff's claim in this action is that the property is still subject to the homestead claim, and that the deed from A. K. MacLeod to Studivan was consequently ineffectual for any purpose.

Section 1243 of the Civil Code provides: "A homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged: 1. By the husband and wife, if the claimant is married." While a deed of trust given simply as security for the payment of a debt is in a certain sense a "grant," it cannot be held to be a grant within the meaning of that word as used in section 1243 of the Civil Code. It is settled that the execution of a deed absolute on its face and purporting to grant the property therein described, is not an abandonment of a homestead where it is, in fact, given solely as security for the payment of money. (*Merced Bank v. Rosenthal*, 99 Cal. 39, 48, [31 Pac. 849, 33 Pac. 732]; *Kennedy v. Gloster*, 98 Cal. 143, 147, [32 Pac. 941]; *Mabury v. Ruiz*, 58 Cal. 11; *Porter v. Chapman*, 65 Cal. 365, [4 Pac. 237].) These decisions are based upon the fact that such a deed, though in form a grant, is really only a mortgage, and does not convey the fee. A trust-deed of the kind here involved differs from such a deed only in that it conveys the legal title to the trustees so far as may be necessary to the execution of the trust. It carries none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor

in the payment of his debt. The nature of such an instrument has been extensively discussed by this court, and the sum and substance of such discussion is that while the legal title passes thereunder, and the trustees cannot be held to hold a mere "lien" on the property, it is practically and substantially only a mortgage with power of sale. (See *Sacramento Bank v. Alcorn*, 121 Cal. 379, 383, [53 Pac. 813]; *Tyler v. Currier*, 147 Cal. 31, 36, [81 Pac. 319]; *Weber v. McCleverty*, 149 Cal. 316, 320, [86 Pac. 706].) The legal title is conveyed solely for the purpose of security, leaving in the trustor or his successors a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them. (Civ. Code, secs. 865, 866.) Except as to the trustees and those holding under them, the trustor or his successor is treated by our law as the holder of the legal title. (*King v. Gotz*, 70 Cal. 236, [11 Pac. 656].) The legal estate thus left in the trustor or his successors entitles them to the possession of the property until their rights have been fully divested by a conveyance made by the trustees in the lawful execution of their trust, and entitles them to exercise all the ordinary incidents of ownership in regard to the property, subject always, of course, to the execution of the trust. This estate is a sufficient basis for a valid claim of homestead. It was expressly held in *King v. Gotz*, 70 Cal. 236, [11 Pac. 656], that the trustor may select as a homestead property covered by such a trust-deed. The estate of the trustees absolutely ceases upon the payment of the debt (Civ. Code, sec. 871), leaving the whole title in the grantor in whom it was vested at the execution of the trust-deed, or his successors, and leaving nothing in the trustees except the bare legal title of record, which they can be compelled to reconvey to the owner simply to make the record title clear. (*Tyler v. Currier*, 147 Cal. 31, 36, [81 Pac. 319].) We think it is apparent that the "grant" referred to in section 1243 of the Civil Code does not include a deed given solely as security for the payment of money.

Of course, the homestead is by the execution and acknowledgment by both husband and wife of such a conveyance in trust subjected to the lawful execution of the trust, and a subsequent conveyance by the trustees in such lawful execution would convey to the purchaser the absolute title to the

property, free of all claim of homestead. (Civ. Code, sec. 1242.) No such effect, however, can be given to a reconveyance of the legal title by the trustees to the owner after payment of the debt. Such a reconveyance is no part of the execution of the trust. The estate of the trustees, as we have seen, is absolutely divested by the payment of the debt, leaving the full title in the trustor and his successors, and the reconveyance to the owner or his successor is simply for the purpose of making the record title clear. (*Tyler v. Currier*, 147 Cal. 31, 36, [81 Pac. 319].)

Defendants rely upon the provisions in the trust-deed which we have hereinbefore quoted, as showing an express abandonment of the homestead, under section 1243 of the Civil Code.

The provision for the reconveyance by the trustees to A. K. MacLeod, or his assigns, at his request and cost, in the event of the payment of the debt, is of no importance in this regard. It is simply the provision ordinarily inserted in such instruments for a reconveyance to the owner, or his successors, upon the payment of the debt, and the consequent termination of the trustees' interest in the property. The testimony of Mrs. MacLeod sufficiently shows that at the time of the execution of this trust-deed, the title to this community property was in the husband. It had been acquired *by him*, she said, by their joint effort, and necessarily the reconveyance, if it was to be stipulated for at all, was stipulated to be made to the grantor in whom title was vested at the time the trust-deed was given (*Tyler v. Currier*, 147 Cal. 31, 36, [81 Pac. 319]), or to any person to whom such grantor may have assigned it by a valid deed, which, the property being subject to the homestead claim, could only be a deed executed and acknowledged by the wife as well as by the husband.

The provision "hereby expressly abandoning all right of homestead in and to said premises," considered in connection with the immediate context, and the object of the instrument, amounted to nothing more than an express abandonment *to the trustees*, for the purposes of the trust, of all claim of homestead. It is true that no such express abandonment to the trustees was necessary to enable them to convey the whole property, free of claim of homestead, to a purchaser at a trustees' sale had in execution of the trust. But this is also true of the whole paragraph of which the provision

relied on forms a part. It was entirely unnecessary to set forth that the parties granted, etc., "also all the estate, interest, claim and demand as well in law as in equity, which the said parties of the first part may have or may hereafter acquire in and to the said premises, with the appurtenances." All this was subjected to the trust by the conveyance by the husband and wife of the property by metes and bounds, just as was the homestead claim. Considering the instrument as a whole, it is obvious that the only object of this paragraph was to completely transfer and abandon *to the purposes of the trust* all possible claims of the parties to the property. While we do not doubt that a general abandonment of a homestead may be contained in another instrument, the provision under discussion cannot reasonably be construed as such an abandonment.

Plaintiff urges that direction be given by this court for entry of judgment upon the findings in favor of plaintiff. This cannot be done, in view of the fact that the findings show an abandonment of the homestead. These findings are attacked by proper specification of insufficiency of evidence to support them, and, in accord with the views we have expressed, it must be held that the attack is well founded. This conclusion necessitates a new trial.

The judgment is reversed.

Shaw, J., McFarland, J., Lorigan, J., Henshaw, J., Sloss, J., and Beatty, C. J., concurred.

Rehearing denied.

[S. F. No. 4851. In Bank.—February 24, 1908.]

E. M. GALVIN, individually, and E. M. GALVIN, as Administrator, etc., Petitioner, v. JOHN HUNT, as Judge of the Superior Court of the City and County of San Francisco, Respondent.

BILL OF EXCEPTIONS—INCORRECT ENGROSSMENT—REFUSAL TO CERTIFY.

—A trial judge is justified in refusing to sign and certify an engrossed bill of exceptions if it fails to truly and fully set forth the matters directed to be inserted therein on the settlement thereof or to correctly exhibit the proceedings which the bill purports to introduce into the record on appeal.

ID.—EXCUSABLE OMISSION IN ENGROSSMENT—PAPERS IN POSSESSION OF ADVERSE PARTY—EXTENSION OF TIME FOR ENGROSSMENT.

—A trial judge would not be justified in refusing to sign and certify an engrossed bill of exceptions solely because it failed to set out certain documents which were ordered to be inserted on the settlement of the bill, when the failure was due to the facts that the originals of such documents had been lost and the only existing copies thereof were in the possession of the adverse party, who refused to permit them to be used for insertion in the bill. Under such circumstances the judge should require the adverse party to produce the copies and grant further time for their insertion in the engrossed bill.

APPLICATION for a Writ of Mandate directed to a Judge of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion of the court.

Frank McGowan, Robert Ash, and E. M. Galvin, *in pro. per.*, for Petitioner.

John J. Barrett, George C. Ross, and Garoutte & Goodman, for Respondent.

SHAW, J.—This is a proceeding in *mandamus* to compel the respondent to sign a bill of exceptions in his official capacity as judge of the superior court of the city and county of San Francisco.

It is alleged in the petition that the bill of exceptions, after having been duly settled by the respondent, was by him or-

dered engrossed, that petitioner thereupon engrossed the bill and presented the same to respondent for his certificate and signature, whereupon he refused to sign or certify it.

The petitioner, who was the plaintiff in the suit of *Galvin v. Fannen*, served on the defendant, Fannen, a draft of his proposed bill of exceptions. Fannen in due time served on Galvin his proposed amendments thereto. The proposed bill and amendments were then presented to the judge and by him settled, a number of the amendments being allowed, and this made it necessary to engross the bill for certification and signature. The petitioner was directed to engross it, accordingly, and was allowed ten days to do so. Within that time he presented to the respondent for signature the document which he claims was the engrossed bill. The respondent refused to sign the same, on the ground that it was not properly or correctly engrossed.

Among the amendments proposed and allowed were two calling for the insertion of certain documents which had once been in possession of Galvin, or his attorney, but which, through the carelessness of one of their employees, had been lost. The only existing copies of these documents were in possession of the attorney of the defendant, Fannen, and said attorney refused to allow Galvin or his attorney to see these copies in engrossing the bill, or to give them the opportunity to have copies thereof made for that purpose. In the proposed amendments these documents were not set out in full, but were merely referred to therein by description. In the engrossed bill they were omitted and in lieu thereof the descriptions contained in the proposed amendments were set out. In excuse for this omission it was stated therein that the plaintiff was unable to insert them because he had not been furnished with copies. The respondent, in his answer to the petition herein, alleges that the petitioner did have copies of the lost documents and could have inserted them, but upon the hearing before this court, it was shown by affidavit, and virtually admitted, that the only copies the petitioner ever possessed were the originals which had been lost before the settlement of the bill. One of the objections to the engrossed bill was the omission of these documents.

The petitioner contends that it was the duty of the respondent, under the circumstances stated, to require the attor-

ney for Fannen to produce his copies of the documents for use in engrossing the bill, or to afford the petitioner an opportunity to copy them for that purpose and to allow the petitioner further time to engross the bill until this could be done. If this were the only objection to the engrossed bill offered we think it would have been the duty of the judge to do as petitioner contends. But an inspection of the so-called engrossed bill shows that it is defective in many other particulars. The petitioner had merely copied the plaintiff's draft, as originally proposed, with certain blanks therein filled by inserting the documents called for, and had attached to it a copy, *in hæc verba*, of the amendments allowed thereto. Some of these amendments called for the omission of long passages of the original draft and the insertion of other and different matter in lieu thereof. Others required the insertion of copies of documents, either in the possession of Galvin or his attorney, or accessible to them. The result of this method of engrossment is a mass of rather incoherent matter, much of which should not appear at all, and the omission of other material matters which should and could have been inserted. In addition to these substantial defects, it appears that the engrossed bill embraces numerous other errors in copying, several of which are material. If the lost documents were supplied and correctly copied, the engrossed bill would nevertheless, because of the other errors referred to, fail to truly or fully set forth the matters directed to be inserted therein, or to correctly exhibit the proceedings which the bill would purport to introduce into the record on appeal. The petitioner did not make to the trial judge, and does not make here, any excuse whatever for the incorporation of these errors into the engrossed bill. The respondent, for these reasons, was fully justified in refusing to settle or certify the bill as presented.

The writ is denied.

Angellotti, J., McFarland, J., Henshaw, J., Sloss, J., and Lorigan, J., concurred.

[L. A. No. 1903. Department Two.—February 27, 1908.]

PACIFIC ELECTRIC RAILWAY COMPANY, Appellant,
v. A. CAMPBELL-JOHNSTON, C. S. CAMPBELL-
JOHNSTON, and SAN RAFAEL RANCH COMPANY,
Respondents.

**SPECIFIC PERFORMANCE—CONTRACT TO BUILD AND OPERATE RAILROAD—
ACTION TO ENFORCE DEEDS OF FRANCHISES—REMEDY NOT MUTUAL.**
—Specific performance of a contract cannot be enforced where
there is no mutuality of remedy between the parties; and since a
contract to build and operate a railroad cannot be specifically
enforced a railway company whose line is not substantially com-
pleted cannot enforce specific performance of contracts to convey
to it rights of way, and franchises, and a bonus of acreage, and to
compel deeds of the same for want of mutuality of remedy against
the plaintiff.

**ID.—WILLINGNESS OF PLAINTIFF TO PERFORM—IMPOSSIBILITY WITHOUT
DEEDS—REFUSAL OF DEFENDANTS—REMEDY AT LAW.**—Neither the
fact that the plaintiff is willing and has offered to complete its
railroad upon the conveyances of the rights of way, franchises, and
bonus of acreage agreed, nor that it has been constructed as far
as it can be without such conveyances, nor the refusal by the de-
fendants to permit it to be completed and operated over their
lands, have any bearing on the equitable principle that where there
is no mutuality of remedy there can be no specific performance.
The railway company must be left to such remedies as it may have
under the contract in an action at law.

APPEAL from a judgment of the Superior Court of Los
Angeles County. Curtis D. Wilbur, Judge.

The facts are stated in the opinion of the court.

Bicknell, Gibson, Trask, Dunn & Crutcher, for Appellant.

Borden & Carhart, and Hunsaker & Britt, for Respondents.

LORIGAN, J.—This action was brought to compel the spe-
cific performance of a contract.

The contract, which is made the basis of the claim of
plaintiff for a specific performance, is set forth in full in the
complaint.

It was executed by all the parties to the action on February 2, 1903, and its preliminary recitals disclose, that the San Rafael Ranch Company was the owner of a large body of land lying between the cities of Los Angeles and Pasadena, a portion thereof, on the northeasterly boundary, being within the limits of the latter city, and the company was also the owner of a bridge across the Arroyo Seco near such northeastern boundary and within said city limits; that the Campbell-Johnstons had acquired franchises from the city of Los Angeles and from the county of Los Angeles to construct and operate street-railroads from the city of Los Angeles to the western boundary of the land of said San Rafael Company, and also contemplated purchasing a franchise then offered for sale, on February 3, 1903, by the city of Pasadena for a street-railroad over the streets of the said city within and near the northeast boundary of the land of said company; that the said San Rafael Ranch Company owned land on both sides of portions of the streets and lines of the right of way mentioned in the Pasadena franchise, and was interested in the construction and operation of a street-railroad upon the lines so indicated; that all the parties of the second part were interested in having a single- or double-track electric railway operated over the lines described in said ordinances across said bridge, and also over the lands of the parties of the second part upon the lines of the street-railway as heretofore surveyed; and that the Pacific Electric Railway Company was willing to construct and operate such railway over the lines aforesaid under the terms and conditions hereafter expressed.

Following the recitals it is then provided that the said parties of the second part, in consideration of the agreements, covenants, and conditions hereinafter contained, agreed to be kept and performed by the party of the first part, do hereby agree, if so requested to do, "to assign, transfer and set over to the party of the first part those certain ordinances, hereinbefore mentioned, granted by the city of Los Angeles, and by the board of supervisors of Los Angeles County, and to assign, transfer and set over to the party of the first part that certain ordinance hereinbefore mentioned, to be offered for sale in the city of Pasadena on the third day of February, 1903, if they, or either of them, acquire the same; and also to grant to the party of the first part the right to construct its railroad track

over the bridge hereinbefore mentioned . . . and operate its cars thereover. . . . And the said parties of the second part further agree for the consideration aforesaid to convey to the Los Angeles Land Company, or such other person or corporation as the party aforesaid may direct, that certain tract of land containing forty acres" (describing it). The contract then declares that "in consideration therefor the party of the first part agrees that upon obtaining the franchise from the city of Pasadena hereinbefore mentioned, and securing the rights of way over the lines as above indicated, such right of way to be not less than forty feet in width on the surface, with such additional width as may be required for the slopes in the fills and excavations necessary in the construction of said roadbed; and the forty-acre tract of land hereinbefore referred to, it will proceed and construct, and operate a railroad, the cars thereon to be propelled by electricity, over the lines above mentioned"; and, "in the event that the parties of the second part fail to acquire the rights of way and franchises necessary for the construction and operation of the railroad upon the lines indicated in the ordinance granted by the city of Los Angeles, and the ordinance granted by the board of supervisors of Los Angeles County; and such other rights of way over private property as herein contemplated; and to convey the forty acres of land hereinbefore mentioned, and the right to operate its cars over the bridge hereinbefore mentioned, then the party of the first part shall be released from all obligations in law or equity to construct or operate a road upon the lines hereinbefore mentioned." The contract then declares that "the intention and purpose of the parties hereto is that the parties of the second part are to furnish a free right of way from the junction of Marmion Way and Pasadena Avenue, upon the line of the railroad heretofore surveyed crossing the Arroyo Seco at or near the bridge now constructed, hereinbefore referred to, and extending the same to and over the line described in that certain ordinance granted by the trustees of the city of Pasadena, to be sold on the 3d instant, as hereinbefore mentioned; and the acquiring by the party of the first part of said franchise to be granted by the trustees of the city of Pasadena as hereinbefore provided. And in the event that the said party of the first part acquires such right of way and said franchises, and the forty acres of

land hereinbefore mentioned to be conveyed to the Los Angeles Land Company, then the party of the first part is to proceed as soon as practicable, to construct said railroad and continue the construction thereof in good faith until the same is completed, and thereafter to operate cars thereover, and said deed conveying said forty acres is to be placed in escrow with a bank to be agreed upon and to be delivered upon the completion and the operation of said road." These are the material portions of the contract.

Having set forth the terms of the contract and the description of the right of way, conveyance of which is sought, the amended complaint then alleges that plaintiff constructed an electric railroad according to the provisions of the franchise granted by the city of Pasadena, referred to in the agreement, through the streets of said city to the northeastern boundary of said tract of land belonging to defendants, and under the franchises granted by the city of Los Angeles and by the county of Los Angeles constructed its electric road from the city of Los Angeles to the western boundary of said land of defendants, and ever since the construction of said electric railways plaintiff has maintained and operated the same as an electric railroad, with well-equipped cars for the carriage of passengers thereon; that the defendants purchased the franchise of the city of Pasadena, referred to in the contract, and, subsequently, assigned it to plaintiff; that though demanded to do so, defendants have refused to transfer and convey to plaintiff the franchises granted by the board of supervisors of the county of Los Angeles and by the city council of the city of Los Angeles; that about September 8, 1904, plaintiff caused to be surveyed through said tract of land belonging to defendants a right of way from the connection of its electric railway at the said northeasterly boundary of said tract of land, and from this to the connection with plaintiff's railway at the western boundary thereof, which said right of way for an electric railway to connect with plaintiff's line as aforesaid, is over the same general route as the prior survey of the lines of a street-railway through said lands mentioned and referred to in said contract of February 2, 1903, and is the one which is described in the complaint; that said survey referred to in the contract was a preliminary survey only in order to determine the feasibility of constructing an electric railway through

the said land of defendants; that said preliminary survey formed the basis of the survey for the final location of the right of way described in the complaint and was so surveyed and located by the plaintiff under the direction and with the consent of the defendants, and the defendants accepted the said final location of said right of way and survey and platted their lands in lots and blocks with reference to and in conformity with said final location of said right of way; that the defendants, though requested, have refused to transfer and convey and deliver the possession of said right of way to plaintiff to enable it to construct its railroad thereon and thereover in accordance with the terms of said contract; that though demanded defendants have refused to execute a deed conveying said forty-acre tract of land, specified in said contract, to the Los Angeles Land Company, and to place the same in escrow, to be delivered to said Los Angeles Land Company upon the completion and operation of said road; that expecting and believing the said promises and agreements of defendants would be fully performed in accordance with said contract, plaintiff constructed the portions of said electric railway alleged to have been constructed; that said portions of said railway were constructed by plaintiff at great expense and as a part of the continuous line of railway contemplated to be constructed in accordance with said contract, and for the purpose of connecting the said lands of the defendants with and to furnish transportation between the same and the said city of Los Angeles and the said city of Pasadena; that the total length of said continuous line of railway is approximately 3.83 miles; that the length of the portion already constructed is approximately 2.78 miles; that the length of the portion remaining unconstructed,—to wit, the portion extending across the said lands of defendants,—is approximately 1.05 miles; that plaintiff has been ready and willing, and is still willing, to fully perform the contract on its part, and now offers to construct its railroad through said tract of land in connection with the portions of said line of railway theretofore constructed and to continue the operation of the whole of said line of railway in accordance with the terms of the agreement.

Other allegations of the complaint we omit as not bearing on the points presented on this appeal.

The prayer of the amended complaint is for a decree requiring defendants to execute conveyances to plaintiff of the right of way through the land of the San Rafael Company described in the complaint, and of the rights and franchises acquired from the city of Los Angeles and the county of Los Angeles; that defendants execute a deed of the forty-acre tract described in the complaint to the Los Angeles Land Company and that it be placed in escrow, and on completion of the line of railroad of plaintiff over said right of way and along the line described in said franchise, referred to in the agreement, and operating the same, the said deed be delivered to said Los Angeles Land Company.

A demurrer, general and special, interposed to the amended complaint, was sustained, and plaintiff declining to further amend, judgment was entered against it. This appeal is from the judgment, and the only point involved in it is as to the correctness of the ruling of the court in sustaining the demurrer.

It is conceded by both parties to this appeal that the demurrer was sustained on the general ground that the amended complaint did not state facts sufficient to constitute a cause of action, the principal reason stated by the court in sustaining it being that the contract relied on was not capable of specific performance for want of mutuality of remedy to both parties to it. Respondents while so conceding and relying on that ground here in support of the ruling of the lower court, based on it, insist that, the demurrer being sustained generally, the ruling is supported, not only for the principal reason given by the lower court, but upon the further ground that the contract relied on is too vague and uncertain in its material terms to entitle plaintiff to specific performance.

While this latter point is pressed here by respondents with as much earnestness as the point upon which it is conceded the ruling was based, we think it unnecessary to burden this opinion with a discussion of it. If the court was right in holding that the plaintiff was not entitled to such specific performance for lack of mutuality of remedy under the contract sued on, that is the end of the action as far as this appeal is concerned, and we think the ruling of the court below in sustaining the demurrer on that ground was correct.

It is the well-settled general doctrine that specific performance of a contract at the instance of one of the parties to it will not be enforced in equity, unless the contract is of such obligatory nature upon both parties that at the suit of either against the other the court would decree specific performance.

This is equally the rule under the code, which provides: "Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance." (Civ. Code, sec. 3386.)

The remedy of specific performance must be mutual, and the test of mutuality of remedy is applied by considering whether the agreement under which the remedy is asserted is of such a character that at the suit of either a court of equity would decree specific performance against the other. In applying this test, if it appears that the right to this remedy is not reciprocal, it is not available to either party to the contract. When there is no such mutuality of remedy, equity refuses to interfere and leaves the parties to assert their rights under the contract in a court of law.

As declared in the leading case in this state on this subject (*Cooper v. Pena*, 21 Cal. 404): "The remedy must be mutual, as well as the obligation, and when the contract is of such nature that it cannot be specifically enforced as to one of the parties, equity will not enforce it against the other." And reiterating and sustaining the doctrine of *Cooper v. Pena* in its application to different contracts where specific performance was sought, but denied for want of mutuality of remedy, are *Anson v. Townsend*, 73 Cal. 418, [15 Pac. 49]; *Stanton v. Singleton*, 126 Cal. 657, [59 Pac. 146]; *Los Angeles etc. Co. v. Occidental Oil Co.*, 144 Cal. 533, [78 Pac. 25].

Having in mind this doctrine, that there must exist a mutuality of remedy in order to warrant specific enforcement of their contract by either party against the other, it is quite clear that no such mutuality exists under the contract upon which this action was based. When we examine that contract, it appears therefrom that the agreement on the part of plaintiff is to "build and operate" a railroad, and as appears from the complaint, in advance of construction of any part of its

railroad over the lands of the defendants, it is seeking to compel them to convey a right of way to plaintiff over such lands, and a further conveyance of what is apparently a bonus of forty acres of land.

Now, if a court of equity at the suit of the defendants could not decree specific performance against plaintiff of the agreement on its part to construct and operate the railroad, then plaintiff cannot enforce specific performance against defendants to convey the right of way and the forty-acre bonus because there is a lack of mutuality of remedy.

It will be observed, as we have said, that the contract on the part of plaintiff is "to construct and operate" a railroad, and under the authorities a court of equity cannot decree specific performance of a contract of that character.

In Wood on Railroads (Vol. I, sec. 210, p. 708), on the subject of actions for the specific performance of contracts to convey rights of way, it is said: "It (equity) will not decree specific performance of contracts which by their terms stipulate for a succession of acts; . . . such as agreements to repair or build, to construct works, to build or carry on railways, mines, quarries and other analogous undertakings." In Pomeroy on Specific Performance of Contracts the author says (sec. 312), while discussing the right to specific performance of contracts: "Finally, contracts which by their terms stipulate for a succession of acts, whose performance cannot be consummated by one transaction, but will be continuous and require protracted supervision and direction, with the exercise of special knowledge, skill and judgment in such foresight—such as agreements to repair or build, to construct works, to build or carry on railways, mines, quarries, and other analogous undertakings—are not as a general rule specifically enforced."

While the contract of plaintiff is both to "construct and operate" a railroad, the authorities hold that a contract providing either for the building or the operation of a railroad, cannot be specifically enforced. (*Strang v. Richmond P. & C. R. R. Co.*, 101 Fed. 511, [41 C. C. A. 474]; *Texas etc. Ry. Co. v. Marshall*, 136 U. S. 407, [10 Sup. Ct. 846]; *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.*, 37 Fed. 733; *Wharton v. Stoutenburg*, 35 N. J. Eq. 266; *Ewing v. Litchfield*, 91 Va. 575, [22 S. E. 362]; *Suburban Con. Co. v. Naugle*, 70 Ill. App. 384.)

Of course, if a contract which provides either for the building only or for the operation only of a railroad cannot be specifically enforced, a covenant providing for both the construction and operation could not be.

Aside from these authorities in other jurisdictions the case of *Lattin v. Hazard*, 99 Cal. 87, [27 Pac. 515], appears to be decisive to the effect that the contract here in question is of such a nature as not to be enforceable specifically. In that case it appears that suit was brought to compel specific performance of a contract to convey lands in consideration of the building of a railroad and its operation for a period of not less than ten years. The road was built but had not been operated for the required period when the action was brought. This court held that specific performance of the contract to convey could not be enforced at the suit of plaintiff; that there was a want of mutuality of remedy under the contract as the operation of the road for the stipulated period was a substantial and important part of the obligation of plaintiff which had not been performed and of which specific performance could not be decreed at the suit of defendant. This conclusion of the court, stated generally in the case cited, that specific performance of the stipulation in the contract to operate the road for ten years could not be enforced by defendant against plaintiff, was undoubtedly based (though there was no particular discussion of the point) on the general rule we have adverted to, that equity cannot enforce the specific performance of a contract to build or operate railroads. And, it is of no moment to the application of the rule that the stipulation is for the operation of such roads for a stipulated period or generally; equity cannot specifically decree their operation at all.

The case of *Stanton v. Singleton*, 126 Cal. 657, [56 Pac. 146], which was an action to compel specific performance of a contract for the erection of a quartz mill and opening and developing a quartz mine, is also in point, this being one of the undertakings as to which, with the building and operating of a railroad, Pomeroy states equity will not decree specific performance. The case last cited and the reasoning applied there in denying specific performance, is equally applicable here.

We pursue the consideration of this point no further. We have been cited to no authority in the briefs of appellant,

and our own examination has failed to disclose any, where it has been held that specific performance may be decreed to enforce a contract such as the one involved here. The rule, as we have seen, is to the contrary, and as defendants would be precluded under its application from obtaining a decree for specific performance against plaintiff to enforce the construction and operation of the railroad provided for had they sued to obtain such a decree, the plaintiff is equally precluded from maintaining an action to compel specific performance on the part of defendants. As both parties to the contract are not entitled to have it specifically enforced, there is a want of mutuality of remedy, and neither one is entitled to the aid of equity to enforce its specific performance against the other. Whatever rights they have must be enforced in an action at law.

It is, however, insisted by appellant that the general rule requiring mutuality of remedy is subject to the exception that when a party has substantially performed his part of the contract he may compel specific performance by the other party. And, in this regard, it is insisted that as it is apparent from the contract that the parties contemplated the construction of an interurban line, extending from the city of Pasadena across the lands of defendants and thence into the city of Los Angeles, there to connect with the railway system of plaintiff already in operation there, and as plaintiff has performed the major part of its obligation by constructing and operating its line from said cities to the boundaries on either side of said lands of defendants, this constitutes a substantial compliance with the contract on its part which removed the want of mutuality of remedy existing at the inception of the contract between the parties, and now entitles plaintiff to a decree of specific performance.

Undoubtedly the want of mutuality in the right to specific performance existing at the inception of the contract may be removed, and is removed, when there has been had a full or substantial performance of the contract. And, in the matter at bar, if the construction and operation of the railroad to the extent that it is alleged to have been done, can be said to constitute a substantial performance of the agreement to construct and operate it in its entirety, then plaintiff would be entitled to specific performance. The substantial execution by

plaintiff of its obligation would give present mutuality to the contract, although in its inception the contract lacked it. (*Spires v. Urbahn*, 124 Cal. 110, [56 Pac. 794].) But it is quite evident from the allegations of the complaint that the agreement on the part of plaintiff relative to the railroad has not been substantially complied with. Conceding that in contemplation of the parties under the contract the road was to be constructed and operated from Pasadena to Los Angeles over the lands of the defendants, it is admitted that it has not been constructed over such lands. There is still nearly one third of the road to be constructed and operated. The most that can be said is that the road has been largely constructed, but it certainly cannot be said that if nearly one third of it is still to be constructed and operated that the contract on the part of the plaintiff has been substantially complied with. The fact is that the road has only been constructed and operated as far as plaintiff can construct it in view of the alleged refusal of defendants to convey the right of way, a conveyance of which with other conveyances plaintiff seeks now to specifically enforce. And it is also true that plaintiff offers in its complaint to perform its part of the contract and complete and operate the road over the lands of defendants. But neither the refusal of the defendants to permit the construction over their lands, nor the willingness of plaintiff to do so, have any bearing in the application of the equitable principle that where there is no mutuality of remedy there can be no decree for specific performance. Every action for specific performance is predicated upon the refusal of a defendant to perform the terms of a contract which the plaintiff considers equity should compel him to perform. So that refusal to do so is of no moment as far as the right to such specific performance is concerned. Neither does the willingness or offer of the plaintiff to do what otherwise it could not be specifically required to do confer the right to compel it from the other party. If this were true, then in the present instance the plaintiff could, by expressing its willingness and offering to complete the road from Pasadena to Los Angeles over the lands of defendants, have demanded of defendants conveyances of the right of way and the forty-acre bonus involved here, and on their refusal to make them and without having completed any part of such road, but reiterating in the com-

plaint its offer and willingness to do so, have demanded specific performance of the defendants. The application of the equitable rule that equity will not specifically enforce a contract to complete or operate a railroad, or other analogous undertakings, is not based upon the inclination or disposition of the parties to the contract. Equity cannot specifically enforce a contract for the performance of *service*; and the construction and operation of a railroad comes within this category. The rule is applied because such undertakings are not of the character that a court of equity will undertake to enforce. Courts of equity only decree specific performance where the subject-matter of the decree is capable of being embraced in one order and is immediately enforceable. It will not decree specific performance when the duty to be performed is a continuous one, extending possibly over a long period of time and which, in order that the performance may be made effectual, will necessarily require the constant personal supervision and oversight of it by the court. Particularly is this true with reference to the construction and operation of railroads, which are enumerated by Pomeroy as among the undertakings concerning which specific performance will not be decreed, because, among other things, they require protracted supervision and direction of the court, with the exercise of special knowledge, skill, or judgment in their oversight. So that in those special and exceptional contracts mentioned by him, including the one under consideration here, as it is impracticable, if not impossible, to supervise and control any decree which the court might make relative to them, it will not undertake to specifically enforce them at all.

Now as there is a large and substantial part of the road still to be constructed and operated by the plaintiff, it cannot be said that there has been such a performance of the contract so as to bring plaintiff within the exception to the general rule. The reason of the rule still applies, and under the principle of the decisions a court of equity could no more effectually decree a specific performance on the part of plaintiff as to this portion of the road still to be constructed and operated, than it could as to the entire road, the construction of which it is claimed was in the contemplation of the parties. The want of mutuality of remedy originally existing under the contract, and which precluded plaintiff from asserting a

right to specific performance, could only be removed by a full or substantial performance on its part, and, as the contract is far from being so substantially performed, the want of mutuality still exists and specific performance cannot be decreed.

There are many other reasons urged by appellant why a court of equity should decree specific performance under the facts alleged in the complaint. They commend themselves to us as general, equitable principles, but cannot be applied here because the rule of equity, that specific performance of contracts of the special character involved here will not be enforced for want of mutuality of remedy, is so well established that it may not be departed from, and the parties must be left to assert such remedies as they have under the contract in an action at law.

For the reasons given the demurrer was properly sustained, and the judgment appealed from is affirmed.

Henshaw, J., and McFarland, J., concurred.

[L. A. No. 1894. In Bank.—February 27, 1908.]

J. T. WALKER, Respondent, v. JOSEPH CHANSLOR et al.,
Appellants.

ACTION FOR PERSONAL INJURIES—ASSAULT AND BATTERY UPON TRESPASSER—FORCIBLE DISPOSSESSION BY OWNER.—An action will not lie in favor of a trespasser upon land of the owner, who seeks forcibly to prevent the entry of the owner thereupon, to recover damages for personal injuries inflicted by the owner in dispossessing trespassers; provided no more force is used than is necessary to make the entry effective.

ID.—COMMON-LAW RULE—CODE REMEDY FOR FORCIBLE ENTRY EXCLUSIVE.—The common-law rule as to the right of an owner forcibly to dispossess trespassers, using only necessary force to that end, prevails in this state, except so far as modified by the code regulating forcible entry, which provides an exclusive remedy for trespassers in possession forcibly dispossessed by the owner. If the force used was not excessive, the trespassers can maintain no personal action against the owner.

ID.—EVIDENCE IN PERSONAL ACTION—FORCIBLE DISPOSSESSION OF OIL LAND—TITLE OF DEFENDANTS—SELF-DEFENSE—ADVICE OF COUNSEL.

—In a personal action for damages for the forcible exclusion of persons in possession of oil lands as adverse claimants, where the answer pleaded title in the defendants and self-defense against an adverse shooting by the occupants with weapons, after notice of plaintiff's title and demand of possession under advice of counsel, it was reversible error to exclude the evidence of defendants' title and of the other facts pleaded and offered in evidence.

ID.—RELEVANCY OF OFFERED EVIDENCE TO DAMAGES.—The offered evidence as to title and as to the other matters bearing on the intentions and good faith of the defendants was relevant not only to the question of exemplary damages, but also as to the question of actual damages and as tending to show a complete defense to the action in the use of force only adequate to repel the attack and obtain the rightful possession of their property.

ID.—INJURY OF EMPLOYEE OF ADVERSE CLAIMANT—RIGHT OF DISPOSSESSION.—If defendants as owners of the land had the right to dispossess the adverse claimants without title, they had the same right to dispossess the plaintiff as their employee; and if he was injured without the use of more than necessary force to dispossess all trespassers, he can maintain no action for the resulting injury.

ID.—REVERSAL OF JUDGMENT FOR EXCLUSION OF EVIDENCE—QUESTION AS TO EXCESSIVE USE OF FORCE NOT CONSIDERED.—In reversing the judgment for the exclusion of offered evidence bearing on the issues involved the question as to whether the other evidence in the record tends to show an excessive use of force by the defendants cannot be considered, the action having been tried on the erroneous theory that defendants were on the land without right to employ any force whatever.

ID.—IMPROPER EXCLUSION OF EVIDENCE TO SHOW THAT OCCUPANTS WERE ARMED.—It was error to exclude evidence that the adverse occupants of the land were armed with deadly weapons when they came upon the property of which defendants pleaded the ownership, and were so armed while in possession and up to the time of defendants' entry upon the land. Such evidence was admissible, in connection with other circumstances, to be considered in determining whether defendants acted reasonably and in good faith, without malice, in making their entry upon the premises also armed, and as bearing upon the question whether they were using only reasonable force in doing so.

'**APPEAL** from a judgment of the Superior Court of Kern County and from an order denying a new trial. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

Byron Waters, for Appellants.

A. D. Warner, Thos. Carroll, John Leo, and W. W. Kaye, for Respondent.

LORIGAN, J.—This action was brought to recover damages for an assault and battery alleged to have been committed by defendants upon plaintiff.

The evidence discloses that the assault and consequent injuries to plaintiff occurred in a contest between two oil companies for the possession of a quarter section of land.

Trial was had before the court without a jury, and from the findings of the court it appears that on April 14, 1901, an oil corporation known as the Superior Sunset Oil Company went into the possession of said quarter section—the northwest quarter of section 26, township 32 south, range 23 east M. D. M., in Kern County—and was in occupation thereof on April 20, 1901, and continued to occupy it until some time thereafter; that on the nineteenth day of April, 1901, plaintiff went into the service of said corporation, and at the time the injuries complained of by him were sustained was upon said premises, together with certain officers and other employees of said corporation; that about the hour of 12:30 A. M. of April 20, 1901, these defendants (appellants herein) who were either officers, directors, or stockholders of another oil company known as the Mt. Diablo Mining and Development Company, together with the employees of said company, all armed with rifles, guns, and pistols, went upon said land with the intention of driving all persons connected with the Superior Sunset Oil Company therefrom; that upon the entry of defendants and such employees upon the said land, an employee of the Superior Sunset Oil Company—Cornell—went out to meet them in order to ascertain their reason for coming on the land; that when he came up to them defendants commanded him to throw up his hands, and, upon his refusal to do so, began shooting at him; that when the shooting commenced plaintiff and others connected with the Superior Sunset Oil Company ran over to where the defendants were to ascertain what was going on; that these defendants and those with them immediately began shooting at plaintiff and those who accompanied him, firing some seventy-five or a hundred shots; that plaintiff was shot through the body and received several other gunshot wounds at the hands of defendants and those with them,

resulting in great suffering to plaintiff, and in his permanent disfigurement and injury, to such an extent as to incapacitate him from doing any physical work.

The court further found that at the time of the shooting the Superior Sunset Oil Company was in possession and occupation of said quarter section, claiming it as its own, as lands chiefly valuable for petroleum oils, under oil mining locations thereof, and that when defendants entered thereon they had no right or business on said land, and were there in violation of law; that the shooting of plaintiff by said defendants was willful and deliberate, the result of an unlawful conspiracy by defendants to violently and by force of arms drive the officers and employees of the Superior Sunset Oil Company and plaintiff off said lands, and that such shooting by defendants was wanton and done with malice and deliberate intent to harm the plaintiff and the other parties who were with plaintiff on the land.

The court rendered judgment in favor of plaintiff against nine of the defendants for the sum of eight thousand five hundred dollars, five thousand dollars thereof being for actual damages and three thousand five hundred dollars for exemplary damages. These nine defendants appeal from the judgment and from the order of the court denying their motion for a new trial.

Before proceeding to consider the merits of these appeals it is proper, as bearing on the points presented here for consideration, to say that there was testimony in the case, introduced on behalf of defendants, that when the officers and employees of the Superior Sunset Oil Company were about to enter and take possession of said quarter section on April 14, 1901, they were met by the superintendent of the Mt. Diablo Oil Company (of which the defendants were officers, directors, and stockholders), who was then upon the section, and who told them that the land belonged to the Mt. Diablo Mining and Development Company, that the company had an oil derrick on it, that he was superintendent, managing the property for it, and they were forbidden to enter, but nevertheless did so. There was evidence also offered by defendants, that after they entered on the property on the night of the shooting their spokesman stated to the person representing the Superior Sunset Oil Company, who came to meet them, that they (defendants) were representatives of the Mt. Diablo Company and

were there to notify the Superior Sunset Oil people to get off the land—that the land belonged to the Mt. Diablo Company; that the Superior Sunset Oil Company not only refused to vacate, but notified defendants to immediately withdraw or take the consequences; that this declaration and notice was immediately followed by shots being fired at defendants by persons representing and in the employ of the Superior Sunset Oil people, who were in the background; that the defendants returned the fire and the shooting then became general on both sides, resulting in the wounding of plaintiff and other employees of the Superior Sunset Oil Company; that thereupon the firing ceased and the defendants withdrew from the premises.

The principal points urged on the appeal for a reversal are as to the rejection of evidence by the trial court, offered by the defendants under their amended answer.

In that answer defendants set up that the Mt. Diablo Mining and Development Company was the owner of the lands in question and on the fourteenth day of April, 1901, was in the possession thereof, and that defendants were employees, officers, and directors of that corporation; that on the fourteenth day of April, 1901, the Superior Sunset Company forcibly dispossessed said Mt. Diablo Company, and thereafter maintained possession of said lands; that on April 19, 1901, defendants, at the instance of the Mt. Diablo Company, and on its behalf, went on the said lands to protect the interest of said corporation, and while thereon were shot at by plaintiff and the other employees of the Superior Sunset Oil Company without cause or provocation, and only returned the fire of said parties in defense of their lives; and that any gunshot wounds received by plaintiff were by reason of said unlawful attack of the Superior Company's employees upon the defendants.

While many exceptions were reserved to the rulings of the court in the admission and rejection of testimony, the points relied on on this appeal relate only to the rejection by the court of evidence tendered by the defendants to show the title of the Mt. Diablo Oil Company to the quarter section in question, and the refusal of the court to allow the witnesses of defendants to testify as to their intentions in going upon said land, and to the taking of the advice of counsel relative to

their contemplated action in doing so; also as to the refusal of the court to permit defendants to show that the officers and employees of the Superior Sunset Oil Company were armed with deadly weapons when, on April 14, 1901, they came upon the quarter section where plaintiff was subsequently injured, and that they were armed from that time up to the occurrence out of which plaintiff's injuries were sustained.

Upon the trial of the cause the plaintiff was permitted to show that the quarter section in question was, on April 19, 1901, unoccupied public land, and that the Superior Sunset Oil Company on that day took possession of and occupied it; that it built a bunk-house and cook-house on the land for its officers and employees, and had been, up to the time of the entry by defendants, engaged in constructing a derrick and placing the necessary machinery for oil drilling purposes, and the court, as we have heretofore stated, found that said Superior Sunset Oil Company was, at the time of the injury of plaintiff, in the possession and occupancy of said land, claiming it as its own.

When the defendants tendered their evidence to show title in the Mt. Diablo Mining and Development Company to the land, as set up in their amended answer, an objection interposed by counsel for plaintiff that "any question of title is irrelevant and immaterial for any purposes of the case" was sustained, the court stating, "I don't think if they had a United States patent they would have any right to go there and force parties who were there wrongfully off the premises. I am not going to try any question of title." Subsequently, the whole deraignment of title of the Mt. Diablo Mining and Development Company to this quarter section was deemed offered by defendants, objected to and the objection sustained. Under exceptions taken by defendants to both these rulings, the question as to the correctness of such rulings is presented for review.

This appeal was originally heard by the district court of appeal for the second appellate district, and in deciding it, it was held by that court that the rulings of the trial court, rejecting the offer of proof of title, as far as it was interposed as a defense against the claim of plaintiff for actual damages was correct; that the matter of title of the Mt. Diablo Company was not a material issue in the case. The appellate court, how-

ever, held that while evidence relative to the title of the Mt. Diablo Company was inadmissible to prove title as a defense to the claim for actual damages, it was admissible as bearing upon the claim of plaintiff for exemplary damages; that for this latter purpose it was admissible, and was one link in defendants' chain of defense, namely, that the Mt. Diablo Company had rights in the land, which defendants, as officers and stockholders of that company, were endeavoring to protect; that the other links in this chain of defense were to be found in the other evidence sought to be introduced relative to the taking by defendants of the advice of counsel and their intentions in entering upon the land where the shooting took place.

In harmony with these views, the appellate court held that it was error to exclude the evidence tendered on all these matters—the title of the Mt. Diablo Company, the taking of advice of counsel, and the intentions of defendants—solely, however, because they were admissible as bearing on the question of exemplary damages, and directed that the judgment and order appealed from should be reversed for this error, unless the plaintiff would, within a given time, elect to accept the judgment for actual damages alone and release that portion of the judgment awarding him exemplary damages.

A petition of appellants that the cause be heard and determined by this court, having been granted, the matter is now before us for disposition.

There can be no question but that the district court of appeal was right in holding that the evidence offered by the defendants of title in the Mt. Diablo Company to this land, the taking of advice of counsel by defendants as to their contemplated action with reference to entering upon the property in question, and their intentions in doing so, were admissible on the question of exemplary damages. Damages of an exemplary character could only be assessed against the defendants upon a showing of malice in fact as distinguished from malice in law. Under the claim made by the plaintiff for exemplary or punitive damages, the good faith and motives of the defendants were directly in issue. And, as bearing on that issue any facts which tended to show their motive and intent in entering upon the premises in question were admissible. As was properly said by the district court of appeal on that sub-

ject: "In some forms of action certain facts being shown, a cause of action for actual damages is conclusively established. Even in such cases the evidence so held to be conclusive as to actual damages is at most *prima facie* evidence only of the right to exemplary damages. (*Childers v. Mercury*, 105 Cal. 289, [45 Am. St. Rep. 40, 38 Pac. 903]; *Taylor v. Hearst*, 107 Cal. 269, [40 Pac. 392].) Malice in fact is defined in the former case to be a 'spiteful or rancorous disposition which causes an act to be done for mischief.' Malice in fact is always a question for the jury. (*Badostain v. Grazide*, 115 Cal. 429, [47 Pac. 118].) Under our system where all persons may testify a witness may be examined as to the intent with which he did a certain act, where that intent is a material thing in the action. Even in a criminal case a defendant may testify as to the intent with which he entered a building or killed a human being, although, of course, a jury is not bound to believe the witness either in a criminal or civil action. But such testimony is competent and relevant and not immaterial. (*Barnhart v. Fulkerth*, 93 Cal. 497, [29 Pac. 50]; *People v. Morton*, 72 Cal. 62, [13 Pac. 150]; *Kyle v. Craig*, 125 Cal. 114, [57 Pac. 791].)

Upon this point it is unnecessary to engage in any further discussion because the claim of appellants that this testimony offered by them was admissible upon the question of exemplary damages is not contested by respondent in his original brief. The claim of error in this respect is not there discussed by counsel for respondent, or authority advanced by him in support of the ruling of the trial court in his briefs. Nor in the supplemental brief of respondent, filed on rehearing here is it undertaken to defend the rulings in this regard. All that is insisted on here is, that some evidence offered as to the good motives and intentions of the defendants in making entry on the land did not sustain them. But this is beside the point urged here. The question is not what was the effect of the evidence on these points which was admitted, but whether it was error to reject other and additional evidence offered on this subject, and we make no question but that it was.

But while we agree with the district court of appeal in its views as to the admissibility of all this evidence offered, as far as it went, we are of the opinion that that court took too re-

stricted and constrained a view as to the extent to which proof of title in the Mt. Diablo Company, offered by appellants, was available to them, when it held that such evidence was admissible upon the question of exemplary damages alone.

The amended answer set up that the Mt. Diablo Mining and Development Company was the owner of the land in question on April 14, 1901, and had been forcibly dispossessed therefrom by the Superior Sunset Company on that day; that the defendants as officers, directors, and employees of the Mt. Diablo Company, at its instance and on its behalf, went on said premises on the nineteenth day of that month to protect the interest of the latter company; that while there they were attacked by the employees of the Superior Sunset Company and defended themselves against said attack, and that any injuries sustained by plaintiff were received while defendants were repelling such attack in self-defense. In other words, that the Mt. Diablo Company, at all such dates, as owner of the land, was entitled to the possession of it; that the defendants, as officers thereof, entered only in the exercise of the right of entry possessed by said company as owner of the property and only used such force against those wrongfully in possession as was necessary to protect them in the exercise and assertion of such right.

The view of the district court of appeal was that this defense could not be asserted against a claim for actual damages; that although one was the owner and entitled to the immediate possession of property, yet if he attempted to obtain possession of his property by force, and in doing so, injury was sustained by a trespasser thereon, proof of such right of entry which the owner attempted to exercise, employing no more force than was necessary to expel the trespasser, would be available to him in defense of a claim for exemplary damages only; that the existence of such right, and its exercise, without unnecessary force, would be no defense against a claim of the trespasser for actual damages sustained by him while the owner was asserting his right of entry.

This view, however, is incorrect. The rule obtaining in this state is subject to no such limitation. It is broader and is the rule of the common law. At common law the owner of real estate had the right to enter upon his property to expel by force an intruder and in doing so was entitled to use all the

force necessary to secure possession. Having the right of entry and exercising it, he would not be subject to an action for tort for damages resulting either from his entry or from any assault upon or physical injury sustained by one in wrongful possession, provided he used no more force than was necessary to dispossess him. The trespasser could only maintain an action for damages against the owner, provided an excessive use of force was employed in making the entry or dispossessing him, and then only for that excess. The rule of the common law is the rule which obtains in this state, except in as far as it has been changed by the provisions of the code relative to the summary remedy provided therein for a forcible entry made upon real property. Under these provisions a right of action is given to one wrongfully in actual possession of property where a forcible entry is made, even by the owner, in which action damages occasioned through the forcible entry may be recovered, and judgment for the restitution of the property had. But the code prescribes a method of procedure and the extent of the remedy for such forcible entry, and that remedy is exclusive. A person wrongfully in possession, dispossessed by the owner of the property having a right of entry, and no excessive force being used in asserting it, is not entitled to maintain any other action than is afforded for a forcible entry under the code. He was not entitled to maintain, under such circumstances, any action whatever under the common law, and the common-law rule has only been changed in this state to the extent, and no further, that the code affords him a remedy under its provisions referred to which he otherwise would not have.

Having these principles in mind, it will be observed that this action is not brought under the provisions of the code relative to forcible entry. It is an action brought purely for assault and battery, and is subject to the common-law rule as to such actions, which is that it is a complete defense to their maintenance, either for exemplary or actual damages, if it be shown that the injuries claimed to have been sustained by one wrongfully in possession, were sustained while the owner of the property was exercising a right to the possession of his land, although using force to obtain such possession, if no more force was employed than was necessary to accomplish it.

We have said that this rule of the common law applies in this state to actions of this character, and we proceed now to refer to the authorities so declaring. This entire matter—the rule of the common law and the extent to which it has been changed by the summary proceeding for forcible entry under the code—is so thoroughly considered in the cases to be referred to as to make some quotations from them suffice for any further discussion of the subject.

Referring first to the case of *Canavan v. Gray*, 64 Cal. 5, [27 Pac. 788], the facts there presented this situation. The defendant Gray, who was the owner of a certain house in which plaintiff was wrongfully in the possession of certain rooms, caused the house to be unroofed and in so doing damaged the personal property of the plaintiff, who brought an action for the injury and obtained a verdict in her favor. The motion of the defendant for a new trial upon the ground of insufficiency of the evidence to sustain the verdict being denied, he appealed.

In disposing of the appeal this court said: "The vital question is, Can the plaintiff, upon these facts, maintain an action of trespass against the defendant? . . . All agree that at common law the plaintiff could not, upon the facts disclosed by this record, maintain any action whatever against the defendants. It is also conceded that the only change which has been made in the law relating to this subject is that made by the statute which, in this state as in many others, provides a summary remedy for forcible entry upon or into any real property. It is only as to the extent of the change wrought by this statute that there is any difference of opinion. . . . The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to the Code of Civil Procedure, but it establishes the law of this state respecting the subjects to which it relates and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice. (Code Civ. Proc. sec. 4.) An action of forcible entry would be a proceeding under the code and its provisions relating to that subject, in such a proceeding, would have to be liberally construed. The code has established the law of the state respecting that subject. It had provided a remedy and prescribed a course of procedure in cases of forcible entry.

And all statutes, laws, or rules on that subject heretofore in force in this state, whether consistent or not with the provisions of the code on the same subject, are repealed and abrogated. . . . The legislature has provided a remedy for forcible entry, no matter by whom made. But it has provided only one remedy. Before there was any legislation on the subject a person in the actual rightful or wrongful possession of real estate could maintain trespass against any one, *not having a right to enter*, for a forcible entry upon it. A person in the wrongful possession could not maintain an action against the owner, having a right to enter, for a forcible entry. But the statute gives a person even in the wrongful possession a right of action, and prescribes its form, against the owner having a right to enter, if he make a forcible entry. Neither expressly nor by necessary implication, does the statute give to a person in the wrongful possession the right to maintain any other than the action of forcible entry when such entry is made by the owner, having the right to enter. The legislature has provided a particular remedy for a forcible entry made under such circumstances, but we are unable to see upon what principle it can be held that another and different remedy, and one which did not exist at common law, and is not given by statute, is equally available in such a case. . . . As the evidence shows that the premises upon which the alleged trespass was committed were owned by the defendant, H. W. Gray, and that he was entitled to the immediate possession of the same, and that the plaintiff was in the wrongful possession thereof, the defendants' motion for a new trial should have been granted on the ground that the evidence was insufficient to justify the verdict."

The other case to which we refer, and which reaffirms the doctrine of *Canavan v. Gray*, is the case of *Burnham v. Stone*, 101 Cal. 165, [35 Pac. 627]. There an action was brought by plaintiff against a number of defendants to recover damages for the alleged killing of the wife of plaintiff, Jennie Burnham. Epitomizing the facts as much as possible, it appears that one of the defendants, Levi P. Stone, was the owner of several tracts, according to the government survey, of a section of land in San Diego County, upon one subdivision of which a dwelling-house and other buildings were situated. In his absence certain persons named Goings took possession of

that portion of the land on which the buildings were located. Stone brought an action against them in the justice's court for forcible entry and detainer, but the complaint did not correctly state the subdivision of the section on which the buildings were located. They were on an entirely different subdivision. He had judgment for the restitution of the premises as described in the complaint and a writ of restitution was issued and delivered to a constable for service. The constable went to the premises upon which the buildings were situated and demanded that the Goings vacate them, which they refused to do. The constable returned later in the day with the defendants Levi P. Stone and James Stone and found Mrs. Burnham, the Goings, and others, in the house with the doors barred, and they still refused to vacate. The day following, the constable, the Stones, and others returned, and in an effort to execute the writ, or obtain possession, one of the constable's posse and one of the Goings, Mrs. Burnham, and another, were killed or mortally wounded. The jury returned a verdict against all the defendants, and James Stone appealed.

It appears that the court instructed the jury, at the request of plaintiff, that in going upon the land for the purpose of obtaining possession by force, or show of force, all the defendants were trespassers, and their entry unlawful, and because thereof, each defendant was liable for the killing of Mrs. Burnham, although the killing was not intended, contemplated, aided, abetted, or advised by him; that if he aided, abetted, or encouraged the unlawful entry upon the premises it was sufficient to fix his liability, and that such entry was unlawful unless the writ of possession covered or included the premises where the homicide occurred.

In passing upon the correctness of this instruction, this court said: "In view of a new trial and of the possibility that the writ does not refer to the buildings as a part of the description of the land, it becomes necessary to consider the instructions upon the supposition that the writ did not cover the premises from which it was attempted to evict the defendants in the writ.

"In such case the instructions were also erroneous. It is conceded that Levi P. Stone was the owner of the buildings and premises where the homicide occurred, and that he had a

right to the possession at that time. Mrs. Burnham made no claim that she was entitled to the possession. Her mother and brother were in possession, and the record shows that when the constable, after demanding that they vacate the premises the morning of the day before the homicide, and being met with a refusal, returned in the afternoon and found Mrs. Burnham there with the others in the house and the doors barred. She was also there when the constable and owner of the premises returned the next day with the *posse*, and at least aided and abetted her mother and brother in retaining possession. Under these circumstances, if she had survived, she could not have maintained an action for assault and battery, or for any injury she might have sustained in an endeavor of the owner to obtain possession, even if the effort were forcible.

"In *Canavan v. Gray*, 64 Cal. 5, [27 Pac. 788], it was held that where the owner of real property having the right of possession makes a forcible entry, the person in wrongful possession cannot maintain an action of trespass, that the remedy provided by statute for a forcible entry is exclusive. . . .

" 'And the law, as generally adopted in the United States may be assumed to be substantially as laid down by Baron Parke. If the owner of land wrongfully held by another enter and expel the occupant, but make use of no more force than is reasonably necessary to accomplish this, he will not be liable to an action of trespass *quare clausum*, nor for assault and battery, nor for injury to the occupant's goods, although, in order to effect such expulsion and removal, it becomes necessary to use so much force and violence as to subject him to indictment at common law for a breach of the peace, or under the statute for making forcible entry.' . . .

"The general ground upon which these authorities are based is that at common law trespass would not lie against the owner if he were entitled to the possession, as in such case the person in possession, being in wrongfully, could maintain no action against the owner, unless unnecessary force was used, and that the statutes of forcible entry and detainer having provided a remedy in such cases, that remedy is exclusive so far as the wrongful possessor is concerned; but the public being interested in preserving the peace may punish the owner

for resorting to force. *Canavan v. Gray*, 64 Cal. 5, [27 Pac. 788], proceeds upon this ground."

After citing a number of authorities from different jurisdictions in support of this rule, including *Sterling v. Warden*, 51 N. H. 252, [12 Am. Rep. 80], where it is said: "It is clearly the English law, and as we believe the strongly preponderating opinion of the American courts, that no civil action lies against a landlord for regaining with force the possession of the demised premises, unless there is an excess of force, and then only for such excess," our court then proceeds to an examination of the instructions referred to, and says: "In the light of these authorities the instruction that the entry upon the premises by force, or show of force, was unlawful, and that if appellant aided and abetted such entry that he was liable for the death of Mrs. Burnham, though he did not aid, abet, advise, or encourage the actual killing, is erroneous. No liability for damages was created against any of the defendants for the entry upon the land, nor for the expulsion, or attempted expulsion of the occupants by force, unless more force or violence was used than was reasonably necessary, and no such qualification appears in the instructions given to the jury. It is quite true that appellant did not, in his answer, plead the ownership and right of entry to Levi P. Stone. The case was tried, however, without any apparent reference to the issues made by appellant's answer, and all the facts were given in evidence without objection or limitation. The court stated to the jury the substance of the complaint, that all the defendants, except Freeman, had answered denying the allegations of the complaint, and alleging that Mrs. Burnham and others acting with her first assaulted them; that they used no more force than was necessary to protect themselves from injury, and also alleged facts tending to justify themselves under the writ of restitution. The jury were expressly instructed that the question of the title to the land was not before them; that 'admitting that Stone was the owner of the land, and that Mrs. Goings was wrongfully in possession of it, this gave Stone, or any one acting with or for him, no right to enter upon the land by force, or show of force, and take possession of it, or exclude or remove Mrs. Goings or any one else from the land; and if you find that the defendants went upon the land in the manner and for the

purpose mentioned, their entry was unlawful, unless justified for other reasons, and the defendants would be liable for the consequences resulting therefrom.'

"Counsel for respondents suggest that the verdict being right upon the evidence, the judgment should not be reversed because of an erroneous instruction. That there are cases where the judgment should stand notwithstanding an erroneous instruction is not questioned; but where the erroneous instruction is such as to cut off a substantial defense on the merits the rule suggested can have no application. The case was not tried upon a theory which would justify this court in looking at the evidence to determine whether unnecessary force was used by defendants, and that became a vital question, assuming that the writ did not cover the premises upon which the entry was made by them."

It is clear from these authorities that one who is in possession of real property without right cannot maintain an action of trespass on his person—assault and battery—against the owner of the property, having a right to its possession, or against those, acting at his instance or in his behalf, who make a forcible entry thereon to dispossess him, where no more force than is necessary is used to make the entry effective.

The defense interposed by the defendants here was that the Mt. Diablo Company had a right of entry upon the property in question as the owner thereof, and that they entered upon it on behalf of such owner in the exercise of such right. In support of the existence of this alleged right of entry and as a basis for its exercise, they were entitled to prove ownership of the property in the Mt. Diablo Company if they could do so, and the trial court in refusing to permit them to do it prevented them from making a defense which they had pleaded and which, if proven as pleaded, would have been a valid defense to the recovery of any damages by the plaintiff, either exemplary or actual.

It is claimed by the respondent that the principle of law declared by the authorities to apply to actions for assault and battery for injuries growing out of the exercise of the right of entry by the owner of land to dispossess those who are trespassers upon it, applies only between conflicting claimants to land; that the rule can have no application in a case where a mere employee (such as it is claimed respondent was)

who had no interest in a contest between the rival claimants to the possession of land and is simply on the premises by virtue of his employment is injured by the owner in exercising the right of entry against his trespassing employer. We perceive no force in this contention. If the Mt. Diablo Company had the right of entry on the lands in question, the defendants, acting for it, in the exercise of that right were entitled to dispossess all persons who were on the premises, whether officers or employees of the Superior Sunset Company, and to exercise all necessary force to do so. They owed no different duty to the employees of the Superior Sunset Company who were upon the premises than they did to the officers of the company who were there. Their sole duty as to all occupants was to use no more force than was necessary to effectuate their removal and obtain full possession, and their responsibility to any of them injured thereby was only for any excessive use of force employed in doing so.

It is further insisted on behalf of respondent, as we understand his brief on rehearing, that the judgment should not be disturbed, as far as it awarded actual damages, for any error in the admission of evidence of ownership of the land by the Mt. Diablo Company, because it clearly appears from the evidence that the force and violence used by defendants in making the entry upon the premises, and as a result of which plaintiff was injured, was so excessive, unnecessary, and unreasonable that the judgment would have had to be the same, whether evidence of ownership had been admitted or not. This proposition is doubtless made upon the theory that this court might make the same alternative order on this appeal as did the district court of appeal. Undoubtedly this court could do so if a proper case was presented for such action. But, as was said in *Burnham v. Stone* (as to a similar suggestion that the judgment there should be affirmed notwithstanding the error committed by the trial court) when the effect of the action of the trial court is to cut off a substantial defense upon the merits, the rule invoked has no application. The case at bar was tried on an erroneous theory which, as in the *Burnham* case, would not justify this court in looking into the evidence to determine whether unnecessary force was used by defendants. Whether unnecessary force was used was a vital question under the pleadings in the

case, and its solution depended largely on whether the Mt. Diablo Company had a right of entry upon the premises or not. The defendants, acting for it, could only employ force to eject those in possession of it if it had. The court not only refused to permit defendants to show that the Mt. Diablo Company was the owner of the property with a right of entry thereon, but while refusing to permit the proof, actually made a finding against defendants on these matters. The court further found that the defendants were trespassers *ab initio* on the property on the night of the conflict; that the "said defendants had no right or business on said lands and were there in violation of law." Of course, under such a view, the trial court must necessarily have concluded that the use of any force employed by the defendants was entirely unwarranted and illegal; that the question as to the degree of force used by the defendants was a false quantity in the case, as the defendants had no right to be upon the land at all or employ any force whatever against those in possession. It is apparent that under these circumstances the case was tried upon an entirely erroneous theory, under which the defendants were precluded from making a defense whereby it could be properly determined by the court whether the force employed by them was necessary only or excessive.

As to the last point made by appellants relative to the exclusion by the court of evidence that the Superior Sunset people were armed with deadly weapons when they came upon the property in question and were so armed while in possession and up to the night of the entry by defendants.

We think such evidence should have been admitted in connection with all the other circumstances attending the dispute over the possession of the property. Under the authorities cited, even if the Mt. Diablo Company had a right of entry to dispossess the Sunset people as trespassers, still the defendants acting in its behalf would be justified in using only necessary force for that purpose and liable for any damages, the result of the use of excessive force. If the officers and the employees of the Superior Sunset Company entered into possession of the property armed, and remained armed, this fact would be proper to be taken into consideration in determining whether the defendants acted reasonably

and in good faith and without malice in making their entry upon the premises also armed, and as bearing upon the question whether they were using only reasonable force in doing so.

This disposes of the only points on the appeal made before the district court of appeal or on rehearing here.

As the trial court erred in rejecting the evidence offered by the defendants on the matters we have discussed, the judgment and order appealed from are reversed, and a new trial ordered.

Sloss, J., Shaw, J., Angellotti, J., McFarland, J., and Henshaw, J., concurred.

[L. A. No. 1926. In Bank.—February 27, 1908.]

DARIO ORENA et al., Executors, etc., et al., Appellants, v.
JOSEPH H. NEWLOVE et al., Executors, etc., et al.,
Respondents.

DEED—INTENTION OF PARTIES—BOUNDARY OF MEXICAN GRANT—MONUMENTS—MISTAKES IN COURSES AND DISTANCES—ERRORS IN MAP REFERRED TO.—Where a deed by the owner of a Mexican grant called for its northwestern boundary, on which monuments were placed, but there was a mistake in the field-notes of the survey thereof as to courses and distances thereon, which, if followed, would leave a narrow strip of worthless land shaped like a church spire, and which was followed in a map made by a county surveyor without survey, showing a mistake in acreage, which was referred to in the deed, and its mistakes inserted therein,—*held*, that it was the real intention of the grantor and grantee that the actual northwestern boundary of the rancho should be the northwestern boundary of the tract conveyed, and that the grantor had no intention of reserving to himself that strip of land.

ID.—TERMINAL MONUMENTS ON BOUNDARY—COURSES, DISTANCES, AND ESTIMATED QUANTITY CONTROLLED.—The call in the deed for the boundary of the rancho must be construed as a call for its actual boundary fixed upon the ground by its terminal monuments, which must control any mistakes in courses, distances, and estimated quantity contained in the deed.

ID.—CONSTRUCTION OF PRIVATE DEED AGAINST GRANTOR.—The construction of a private deed is against the grantor and in favor of the grantee.

ID.—REFERENCE TO COUNTY SURVEYOR'S MAP NOT CONTROLLING.—Under the circumstances of this case the reference in the deed to the map of the county surveyor, and the adoption of its mistakes in description of boundary and quantity in the deed, is not controlling as to the land intended to be granted by the boundary of the rancho, where said boundary is called for in the deed and also in the map, which contains some reference to monuments, and is controlled as to its mistakes by the monuments known by the parties to exist on the ground.

APPEAL from a judgment of the Superior Court of Santa Barbara County and from an order denying a new trial. J. W. Taggart, Judge.

The facts are stated in the opinion of the court.

Bishop, Wheeler & Hoefler, Chas. S. Wheeler, and J. F. Bowie for Appellants.

The parties contracted with reference to a particular county map made by the county surveyor, and its description is controlling as to the intention of the parties and the location of the boundary therein described. (*Miller v. Grunsky*, 141 Cal. 441, 66 Pac. 858, 75 Pac. 48; *Chipley v. Farris*, 45 Cal. 527; *Schenley v. Pittsburg*, 104 Pa. St. 472, 480; *New York etc. Land Co. v. Thomson*, 83 Tex. 169, 17 S. W. 920; *Jones v. Johnson*, 18 How. (U. S.) 150.)

B. F. Thomas, Lee, Scott & Chase, and J. S. Chapman, for Respondents.

The object of construction is to ascertain the intention of the parties. (Civ. Code, sec. 1637; *Brannan v. Mesick*, 10 Cal. 95; *Reedy v. Smith*, 42 Cal. 245, 251; *Racouillat v. Dansevain*, 32 Cal. 376, 387; *Sprague v. Edwards*, 48 Cal. 239; *Miller v. Grunsky*, 141 Cal. 441, 447, 450-453, 66 Pac. 858, 75 Pac. 48; *Waterman v. Andrews*, 14 R. I. 589.) Parties to a conveyance are supposed to be on the land or acquainted with the land conveyed, and to have noticed permanent objects constituting the boundary therein referred to. (*Van Dyke, J.*, in *Miller v. Grunsky*, 141 Cal. 452, 453, 66 Pac. 858, 75 Pac. 48.) The call in the deed for the western boundary of the ranch is the call for a monument or monuments in the survey thereof constituting the boundary controlling inconsistent

courses or measurements. (Code Civ. Proc., sec. 2077, subd. 2; *Kittle v. Pfeiffer*, 22 Cal. 491; *Colton v. Seavey*, 22 Cal. 497; *Piercy v. Crandall*, 34 Cal. 334; *Umbarger v. Chaboya*, 49 Cal. 525; *Powers v. Jackson*, 50 Cal. 429, 432; *Perry v. Richards*, 52 Cal. 496; *Rice v. McKune*, 63 Cal. 124; *Chapman v. Polack*, 70 Cal. 487, 11 Pac. 764; *Hughes v. Wheeler*, 76 Cal. 230, 18 Pac. 386; *Castro v. Barry*, 79 Cal. 448, 21 Pac. 946; *Whiting v. Gardner*, 80 Cal. 78, 80, 22 Pac. 71; *Anderson v. Richardson*, 92 Cal. 623, 28 Pac. 679; *Gordon v. Booker*, 97 Cal. 586, 32 Pac. 593; *Harrington v. Boehmer*, 134 Cal. 196, 66 Pac. 214, 489; *Miller v. Grunsky*, 141 Cal. 450, 66 Pac. 858, 75 Pac. 48; *Galbraith v. Shasta Iron Co.*, 143 Cal. 94, 76 Pac. 901; *Kimball v. McKee*, 149 Cal. 436, 450, 86 Pac. 1089, 1095; *Bartlett Land and Lumber Co. v. Saunders*, 103 U. S. 316; Devlin on Deeds, Vol. 2, sec. 1034; 4 Am. & Eng. Ency. of Law, 2d ed., pp. 771, 773, 780, 783, 785; *Chapman v. Hamblet*, 100 Me. 454, 62 Atl. 215; *Ogden v. Porterfield*, 34 Pa. St. 191; *Nash v. Atherton*, 10 Ohio, 163; *Sparhawk v. Bagg*, 82 Mass. (16 Gray), 583; *Rowell v. Weinemann*, 119 Iowa, 256, 97 Am. St. Rep. 310, 93 N. W. 279; *Martin v. Carling*, 19 Wis. 454, 88 Am. Dec. 696; *Billingsley v. Bates*, 30 Ala. 376, 68 Am. Dec. 126.) The construction of the deed must be most favorable to the grantee. (Civ. Code, sec. 1067; *Dodge v. Walby*, 22 Cal. 229, 83 Am. Dec. 61; *Vance v. Ford*, 24 Cal. 446; *Castro v. Tennant*, 44 Cal. 257; *Walsh v. Abbott*, 145 Cal. 288, 104 Am. St. Rep. 38, 78 Pac. 715; *Melvin v. Proprietors*, (5 Met.) 46 Mass. 15, 38 Am. Dec. 384; 4 Am. & Eng. Ency. of Law, p. 80.) The construction placed upon the contract by the parties, and their practical location of the boundary, is to be considered. (*Yocco v. Conroy*, 104 Cal. 468, 38 Pac. 107; 2 Cyclopaedia of Evidence, pp. 715, 716, 859; Devlin on Deeds, secs. 851, 1042.) The construction must be against making gap in a boundary not likely to have been contemplated by the parties. (*Piercy v. Crandall*, 34 Cal. 334; 4 Am. & Eng. Ency. of Law, pp. 783-785.)

Richards & Carrier, for Mercantile Trust Company, Respondent.

The strip in controversy passed by the deed, according to the intention of the parties. (Civ. Code, sec. 1636; *Kimball*

v. *Semple*, 25 Cal. 440, 447.) The intention should not be inferred to leave out the strip in controversy. (*Piercy v. Crandall*, 34 Cal. 334; *Mendenhall v. Paris*, 84 Cal. 193, 23 Pac. 1095.) The closing line must run from corner to corner. (*Glass v. Gilbert*, 58 Pa. St. 266, 293.) A boundary line is "an artificial object," to be ascertained from actual monuments, notwithstanding a confiction in map or plat. (*Steusoff v. Jackson*, (Tex. Civ. App.) 89 S. W. 445, 463; *Umbarger v. Chaboya*, 49 Cal. 525, 538; *Vance v. Ford*, 24 Cal. 435; *Serrano v. Rawson*, 47 Cal. 52; *Perry v. Richards*, 52 Cal. 675; *Wheeler v. Benjamin*, 136 Cal. 51, 68 Pac. 313; *Whiting v. Gardner*, 80 Cal. 78, 22 Pac. 71; *Burk v. McCowen*, 115 Cal. 481, 47 Pac. 367; *Esmond v. Tarbox*, 7 Greenl. (Me.) 61, 20 Am. Dec. 346.) Where there are inconsistent descriptions in a deed it must be construed in favor of the grantee. (Civ. Code, sec. 1069; *Vance v. Ford*, 24 Cal. 446; *Piper v. True*, 36 Cal. 617; *Freeman v. Bellegarde*, 108 Cal. 184, 49 Am. St. Rep. 476, 41 Pac. 279.)

BEATTY, C. J.—This is an action to quiet title, the complaint containing the usual allegations of ownership by plaintiffs and of assertion by defendants of an invalid adverse claim of an estate and interest in the demanded premises. The land in dispute is a portion of the Los Alamos Rancho in Santa Barbara County, which was patented by the United States in September, 1872 to Jose Antonio de la Guerra—the Mexican grantee—in conformity to the plat and field-notes of a survey made by a United States surveyor in 1860. The plaintiffs deraign title by devise and mesne conveyances from the devisee of De la Guerra. The defendants, at the commencement of the action, were in possession of the land, claiming under mesne conveyances from Jose Antonio Feliz, to whom De la Guerra made a conveyance by bargain and sale deed in August, 1867, of a portion of the grant as surveyed in 1860, and afterwards patented. If this deed described the disputed tract, it belongs to the defendants. The superior court found in favor of the defendants upon this point, and also sustained their pleas of laches, and title by prescription. From the judgment entered upon these findings, and from an order denying their motion for a new trial, the plaintiffs have appealed.

In view of our conclusion that the trial judge correctly construed the deed from De la Guerra to Feliz, as including in its description the tract in dispute, we shall not have occasion here to consider the elaborate argument of counsel upon the question of laches and limitations.

Los Alamos was a grant of eleven leagues, containing, according to the field-notes and plat of the patent survey, 48,803 acres. It was laid off in the general form of a pentagon with a southern side, bounded by a line approximately east and west, and with the apex of the opposite salient angle pointing to the north. Three of its five sides (the south, the west, and the northwest), were defined by straight lines, the other two by broken lines. The initial point of the survey was at the southeast corner, and the first course was north $21\frac{1}{2}$ degrees east, 231.38 chains. The station at the end of each course was marked by a post, and the posts were lettered and numbered consecutively A. 1, A. 2, A. 3, and so on to the point of beginning. The post at the northern apex was marked A. 15 (Alamos 15) and the straight line connecting that station with post A. 16 at the northern end of the west side of the grant constituted, and has always constituted, the northwestern boundary of the rancho. But there was a mistake in the field-notes and plat of the survey as returned and approved in 1860 as to the length and true course of this northwestern boundary, and to that mistake all the uncertainty in the deed from De la Guerra to Feliz is due. The course given in the field-notes and marked on the plat of the patent survey is south $50\frac{3}{4}$ degrees west, whereas it is in fact south 55 degrees 51 minutes west, and the real distance is 387 chains instead of 380.15 chains, as stated in the field-notes. The field-notes nevertheless do correctly place the posts, A. 15 and A. 16, as they were set and as they have since remained, so that there has never been any real uncertainty as to the true location of the northwestern boundary of the rancho.

The land in controversy is an elongated triangle containing four hundred and forty-six acres, having its apex at post A. 15 and lying between the true northwestern boundary of the rancho and the mistaken course (south $50\frac{3}{4}$ degrees west) given in the field-notes of the line from post A. 15 to post A. 16. The grounds of the controversy arise out of

the terms employed in the deed from De la Guerra to Feliz to describe the tract conveyed, which, while they call for the western (meaning the northwestern) boundary of the rancho as the northwestern boundary of said tract, give a course to that boundary, and a length to the southern boundary which leave out the tract in controversy, and include the exact number of acres (two thousand nine hundred and forty-five) mentioned in the deed, which is less by four hundred and forty-six acres than the quantity included if we disregard the calls for courses, distances, and quantity, in favor of the call for the western boundary of the rancho. This was done by the superior court in construing the deed, and this is the error alleged by the plaintiffs in support of their appeal.

We do not think that the superior court erred in its construction of the deed. We are convinced to begin with, aside from any considerations based upon technical rules of construction, that the real intention of both grantor and grantee was that the northwestern boundary of the rancho should be the northwestern boundary of the tract conveyed; or, in other words, that the grantor had no intention of reserving to himself a narrow strip of worthless land in the shape of the outline of a church spire between the land conveyed to Feliz on one side, and government land on the other. The circumstances of the transaction and the situation of the parties afford a perfect explanation of the employment in the deed of terms of description, which, if literally followed, would defeat their real intention. The description contained in the deed was based upon a so-called survey of the tract to be conveyed made by the county surveyor of Santa Barbara for the grantee, Feliz, which was one of a series of similar surveys made and recorded in the surveyor's office by which the northern and eastern portion of the Los Alamos Rancho was subdivided for the same purpose, it may be presumed, as that disclosed in the present instance—for the purpose, that is to say, of furnishing a convenient description of the tracts to be conveyed. They were, in fact, not surveys at all, but mere subdivisions marked by lines drawn to scale on a plat of the rancho made in conformity to the field-notes of the patent survey, including the erroneous calls for course and distance of the north-

western boundary—the line from A. 15 to A. 16. They were numbered on the plat from east to west as survey No. 357-358-359 and 360, the last being the Feliz survey. To make this so-called survey, No. 360, nothing was done except by applying a scale to the plat of the rancho, to mark a point on the western boundary of survey No. 359, 135 chains south of post A. 13 of the patent survey, and to draw a line due west from this point to the straight line connecting the posts A. 15 and A. 16. The area included within these lines and the lines connecting A. 13 and A. 14, A. 14 and A. 15, and the line marking the western boundary of county survey 359 became county survey 360. The length and direction of all these lines except those extending from the initial point to the intersection of the northwestern boundary and from that point to post A. 15 were correctly given, but these two being computed upon the false datum of the course of the line A. 15-A. 16 were too short to include the land in controversy. To be specific, the length of the south line as marked on the plat was 273.72 chains to the intersection of the platted boundary; whereas the actual distance on that line to the true boundary is 321.14 chains. The length of the line from said intersection to post A. 15 is given as 301.31 chains, while from the intersection of the south line and the true boundary the distance is 330.08 chains.

With this misleading plat to guide them the deed to Feliz was drawn containing the following description: "All that portion of the 'Rancho de los Alamos' situate in the third township of the said county of Santa Barbara, containing two thousand nine hundred and forty-five acres, embraced in county survey No. 360 made the 7th day of June, 1867, bounded and described as follows:

"Commencing at a point on the western line of county survey No. 359, and 135.00 chains south of post 'A' No. 13 of the official survey of said rancho, and running thence west (273.72 chains) two hundred and seventy-three chains, seventy-two links to station No. 2 of said county survey No. 360 on the western boundary line of said rancho; thence north 50 3-4 deg. E. along the western boundary line of said rancho 301.31 chains to the third station of said survey; thence S. 59 1-4 deg. E. along the northern boundary line of said rancho 47.00 chains to station No. 4 of said county

survey; thence south 166.60 chains to the place of beginning."

(The use of the word "station" in this description is a pure fiction. The map shows no numbered stations. The third station means post A. 15, and station No. 4 means post A. 14 of the official survey of the rancho.)

It is easy to see from the facts here stated what was the real intention of the parties to this deed with respect to the northwestern boundary of the tract conveyed. De la Guerra was intending to sell, and Feliz to buy, the triangular area lying between county survey No. 359 and the line extending from post A. 15 to post A. 16, comprising all the remaining portion of the rancho north of a line drawn due west from a point 135 chains south of post A. 13. The northwestern boundary of the rancho was a real boundary defined by a straight line between permanent monuments standing on the ground, the position of which both parties must be presumed to have known. The call in the deed for that boundary was therefore a call for the real boundary as defined by the terminal monuments, and the erroneous calls for courses, distances, and quantity must give way in accordance with the rule prescribed by subdivision 2 of section 2077 of the Code of Civil Procedure.

The fact that the description in the deed refers to county survey No. 360 does not bring the case within the authority of *Miller v. Grunsky*, 141 Cal. 441, [66 Pac. 858, 75 Pac. 48], in which a call for the eastern boundary of the Orestimba Rancho was denied controlling force in a patent issued by state officers for state lands.

The differences between that case and this are numerous and material. Aside from the rule that grants from the state are construed most strongly against the grantee, while as between private parties grants are construed most strongly against the grantor, the facts of this case are sufficient to distinguish it from the *Miller-Grunsky* case. There the county survey which was the sole and exclusive guide to the state officers issuing the patent, represented the eastern boundary of the Orestimba Rancho as 6½ chains west of a government subdivision, and that was the distance called for in the patent. The state officers, charged with the issuance of the patent for the precise number of acres that had

been paid for by the purchaser, knew nothing of any monuments on the ground marking the eastern boundary of the Orestimba Rancho. They did by the calls for courses and distances inserted in the patent, describe a tract containing precisely the number of acres that Miller had paid for, and they inserted the boundary of the Orestimba Rancho only because it was one of the calls of the county survey. In fact, this call in the survey was correct at the time it was made in the field, for at that time the monuments of the first survey of the Orestimba Rancho stood $6\frac{1}{2}$ chains west of the "point noted," but that survey had been set aside and a new survey approved before the issuance of the state patent to Miller—which placed the eastern boundary of the rancho at 20 chains west of the "point noted," and the attempt of the grantee was to stretch his grant over the whole 20 chains, so as to include more than three times the land originally surveyed and paid for—thereby depriving a subsequent purchaser from the state of what he had paid for.

In this case the land was not sold by the acre, or by a person who could sell in no other way, and the grantor knew the actual boundary mentioned in his deed. The circumstances of the case show that he intended to sell all the land north of the line drawn due east and west through a point 135 chains south of post A. 13 and west of survey 359. It was a lumping sale of that corner of the rancho. The area, owing to a mistake in the plat of the rancho, was computed at two thousand nine hundred and forty-five acres, instead of three thousand three hundred and ninety-one acres, but the round figure of one thousand dollars agreed upon as the purchase price shows that if acreage had anything to do with the estimate of value it was a very minor consideration. It is at least a plausible hypothesis that as the computation showed an area of about three thousand acres the price of one thousand dollars was agreed upon because the land was valued at about thirty-three and one-third cents an acre. The evidence is that the land along the northwestern boundary was mountainous, rocky, and barren—much of it unfit even for pasturage. If the mistake as to the area had not been made, the difference in the purchase price on this supposition would have been less than

two hundred dollars, reckoning the land in controversy at the average value of the whole tract.

In short, the difference between this case and the Miller-Grunsky case is this: That there the officers issuing the patent framed their description with *exclusive* reference to a map or survey which showed the number of acres paid for by the grantee, and they had no authority to convey more. The map was entirely inconsistent with a construction of the patent which would have more than trebled the quantity of land intended to be conveyed—a capital consideration in that case. The only evidence that the eastern boundary of the Orestimba Rancho was 20 chains west of the “point noted” was a map, which the state officers had never seen, and which they could not have taken as a guide if they had seen it; and, besides, the evidence *aliunde* showed that the map relied upon by Miller was based upon a new survey of a corrected boundary of the rancho, by which it was changed from the position stated in the county survey to the position claimed at the date of the patent. Here the grantor could convey any designated portion of the Alamos Rancho without regard to acreage or price. The description in his deed does, it is true, refer to a map, but that map calls as loudly for the boundary mentioned in the deed as it does for the course of that boundary, or the length of the line. The boundary was a fixed boundary defined by monuments, the position of which must have been known to the parties. The map, while inconsistent in minor particulars with the calls of the deed, is consistent with it in a more important particular, for it shows the boundary and the monuments which define it. In this particular it is corroborated by all the surrounding circumstances, while as to the courses and distances it is wholly at variance with those circumstances.

The deed and map are consistent as to a main and controlling fact within the knowledge of both parties; the inconsistency is only with respect to minor particulars as to which both parties were mistaken. The call for the boundary must therefore be held to mean the actual boundary, and to include the land in controversy.

The judgment and order of the superior court are affirmed.

Henshaw, J., Shaw, J., Angellotti, J., Lorigan, J., and Sloss, J., concurred.

Rehearing denied.

[L. A. No. 1626. In Bank.—February 29, 1908.]

A. PHILLIPS, Appellant, v. ANDREA PRICE et al.,
Respondents.

CREDITOR'S BILL—PROCEEDINGS SUPPLEMENTARY TO EXECUTION—ADEQUACY OF LEGAL REMEDY.—In this state a creditor's bill in equity to reach the property of a judgment debtor and subject it to the judgment creditor's claim will not lie when the statutory proceedings supplementary to execution afford an adequate legal remedy. On the contrary, if such supplementary proceedings are inadequate, relief by creditor's bill may still be had.

ID.—SUPPLEMENTARY PROCEEDINGS WHEN INADEQUATE REMEDY.—Proceedings supplementary to execution are not an adequate remedy whenever they cannot in themselves, without the aid of an independent action, result in subjecting the property, whether tangible or a mere chose in action, to the payment of the creditor's claim. Such condition exists whenever it appears that the person who is charged with holding property belonging to the judgment debtor, or with being indebted to him, claims title to the property or denies the debt. In either case an action is necessary, and the creditor may proceed by creditor's bill without first pursuing the statutory proceeding supplementary to execution. On the other hand, where it does not appear whether or not the person alleged to hold property or to be indebted will claim the property or deny the debt, such proceedings may afford all the relief required and must be pursued.

APPEAL from an order of the Superior Court of San Luis Obispo County. E. P. Unangst, Judge.

The facts are stated in the opinion of the court.

F. A. Dorn, for Appellant.

McD. R. Venable, and C. P. Kaetzel, for Respondents.

SLOSS, J.—The demurrer to plaintiff's second amended complaint was sustained. Plaintiff declined to further amend, and appeals from the resulting judgment against him.

The complaint is in two counts, and the question is whether either states a cause of action.

The first count alleges the following facts material to the point to be discussed: In 1898 a judgment was obtained in a justice's court against W. B. Price for \$253.43. This judgment, now amounting to \$340.65, no part of which has been paid, has been assigned to the plaintiff. After such assignment plaintiff caused an execution to be levied by garnisheeing all sums of money due the judgment debtor from the defendants herein. It is alleged that at the time of such levy the defendants, as executrix and executors of the will of one John M. Price, deceased, were in possession of \$1,063.58 belonging to such judgment debtor, such sum having been, by a decree of distribution in the estate of said John M. Price, determined to be due to W. B. Price as a legatee under the will. At the time of the levy no part of said sum of \$1,063.58 had in fact been expended by the defendants. Said defendants refused to make any statement to the sheriff of the money in their possession, or to pay any portion of it to the sheriff on the execution. The plaintiff thereupon proceeded, under sections 717 et seq. of the Code of Civil Procedure to obtain an order requiring the defendants to appear before the justice to answer concerning their indebtedness to W. B. Price. They appeared and denied any indebtedness, testifying that W. B. Price's distributive share had been paid to him more than ten days before the making of the decree of distribution. The plaintiff thereupon caused the execution to be returned unsatisfied. On the hearing the justice ordered the defendants to pay into court within ten days the sum of \$340.66, to be applied toward the satisfaction of the judgment. The defendants obtained from the superior court an injunction restraining the justice from enforcing this order. It is further alleged that since the levy of the execution the defendants, with intent to delay the judgment debtor's creditors, have paid to him his said distributive share.

In all essential respects, the second count is the same, except that it sets out a judgment for a different amount against Carlota Vidal, another beneficiary under the will of John M. Price. The steps taken to enforce the collection of this judgment were the same as those taken in the case of W. B. Price. Both counts may therefore be discussed together.

It is conceded by the respondents that, if there were no statutory provisions for proceedings supplementary to execution, the complaint would be sufficient as a "creditors' bill,"—that is, it would state a case for relief by a court of equity to subject to the satisfaction of the judgment creditor's claim assets which could not be reached by execution. But it is contended—and such is undoubtedly the settled law of this state—that since our statutes have provided a method of reaching such assets by supplementary proceedings, there is no longer, in cases where the statutory method is adequate, any ground for the interposition of equity. In *Herrlich v. Kaufmann*, 99 Cal. 271, [37 Am. St. Rep. 50, 33 Pac. 857], the court said: "Formerly assets of a judgment debtor which could not be effectively seized by the sheriff under an execution, such as a debt owing to the defendant, could be reached, upon a proper showing, through a court of equity by means of a creditors' bill or suit, but in this state, and in most of the other states, a legal remedy is afforded by statutes providing for proceedings supplementary to execution, and the general rule is that when there are such statutory proceedings they must be pursued." (See, also, *Adams v. Hackett*, 7 Cal. 201; *Pacific Bank v. Robinson*, 57 Cal. 522, [40 Am. Rep. 120]; *Habenicht v. Lissak*, 78 Cal. 357, [12 Am. St. Rep. 63, 20 Pac. 874]; *Matteson etc. Co. v. Conley*, 144 Cal. 483, [77 Pac. 1042].) It was accordingly held in *Herrlich v. Kaufmann* that a judgment creditor who has served a notice of garnishment upon a person indebted to the judgment debtor, without having taken any of the statutory steps provided by sections 717 to 720 of the Code of Civil Procedure, cannot maintain a creditors' bill in equity against the garnishee to reach the indebtedness. And this rests upon the doctrine, applicable generally to proceedings in courts of chancery, that equitable relief cannot be had except where the plaintiff appears to be without a plain, speedy and adequate remedy at law.

On the other hand, where the statutory proceedings supplementary to execution do not for any reason afford an adequate remedy, relief by creditors' bill may still be had. (*Lewis v. Chamberlain*, 108 Cal. 525, [41 Pac. 413]; *Rapp v. Whittier*, 113 Cal. 429, [45 Pac. 703].) In *Lewis v. Chamberlain*, where the judgment creditor sought, by proceedings supple-

mentary to execution, to reach property alleged to have been fraudulently transferred by the judgment debtor, it was held that the court had no jurisdiction to compel the transferee who claimed title to the property, to surrender it or subject it to the satisfaction of the judgment. In answering the argument that the proceeding, being a substitute for a creditors' bill, should be given the same scope as such bill, the court said that the code provisions "could not take the place of a creditors' bill where, as here, the judgment debtor had conveyed the property to a third person who claimed title under such conveyance." In *Rapp v. Whittier*, where there had been a void transfer of the personal property of the judgment debtor and the transferee claimed title, a creditor's bill was sustained, although no proceedings supplementary to execution had been taken. The court said: "Since appellant asserted title under the transfer from Robbers (the judgment debtor), and adversely to him, it would have profited plaintiffs nothing to pursue the course provided by the statute; in the face of that claim they could not, by supplementary proceedings, reach the fund held by appellant. In such a case those proceedings do not supersede the remedy by action, for the reason that they are not adequate to accomplish the purpose of the action."

The present case seems to present the same situation as that considered in *Rapp v. Whittier*. There the defendant denied that he had any property belonging to the judgment debtor, asserting title in himself. Here the defendants denied that they owed anything to the judgment debtor, claiming that the debt had been paid before the levy of the execution. The same reason exists here that existed in the former case for holding that proceedings supplementary to execution would not have been of avail to the plaintiff. Such proceedings could not, in view of the denial of liability, have enabled the plaintiff to reach the fund without an action. The plaintiff here did indeed attempt to pursue the statutory method, and obtained an order for the payment by defendants of the amount due. But the enforcement of such order was stayed by judgment of the superior court, doubtless for the reason that the denial of liability, at least in the absence of bad faith (*Parker v. Page*, 38 Cal. 526), deprived the justice of power to order the payment. Upon such denial of liability the only

order that could be made was one authorizing the plaintiff to institute an action to recover the debt. (Code Civ. Proc., sec. 720.) It is urged that plaintiff was bound to obtain such order before commencing any suit; that until he had done so he had not exhausted his legal remedies. But the same argument would have required the denial of relief in *Rapp v. Whittier*. Section 720 provides for an order authorizing suit where it appears that the person alleged to have property belonging to the judgment debtor, or to be indebted to him, "claims an interest in the property adverse to him, or denies the debt." Yet the plaintiff in the *Rapp* case was permitted to maintain his bill without obtaining leave to sue. The true ground of the decision in *Rapp v. Whittier* was that proceedings supplementary to execution are not an adequate remedy whenever they cannot in themselves, without the aid of an independent action, result in subjecting the property—whether tangible or a mere chose in action—to the payment of plaintiff's claim. Such condition exists wherever it appears that the person who is charged with holding property belonging to the judgment debtor or with being indebted to him, claims title to the property or denies the debt. In either case an action is necessary, and the plaintiff may proceed by creditors' bill without first pursuing statutory proceedings which could not give him anything more than a right to sue. On the other hand, where it does not appear whether or not the person alleged to hold property or to be indebted will claim the property or deny the debt, proceedings supplementary to execution may afford all the relief required and they must be pursued. *Herrlich v. Kaufmann* and *Matteson etc. Co. v. Conley* are such cases.

We can see no ground for distinguishing between the case of tangible real or personal property claimed to be held by a third party for the debtor, as in *Rapp v. Whittier*, and that of a debt claimed to be due the debtor. The code section (720) makes the same provision for both cases.

For these reasons we think that each count of the complaint stated a cause of action, and that the demurrer should have been overruled.

The judgment is reversed.

Shaw, J., Lorigan, J., Henshaw, J., and McFarland, J., concurred.

BEATTY, C. J., concurring.—I concur in the judgment of reversal, but not in the view that a judgment creditor may neglect compliance with the provisions of sections 717 et seq. of the Code of Civil Procedure, merely because a garnishee has denied any indebtedness to the judgment debtor. I think he must still apply for a citation to the garnishee to answer under oath before the court or judge as provided in section 717, and do everything required of him to secure an admission of the indebtedness, for such an admission will entitle him to an order for payment without action—the main object of the summary proceeding prescribed by the statute.

But if he fails to secure such admission, it then becomes the imperative duty of the court or judge to make an order authorizing him to institute an action.

If the court or judge refuses or fails to make such order, the statutory proceedings has failed to afford him relief, and he is remitted to his remedy as it existed before the statute.

In this case it appears from the allegations of the complaint that the plaintiff did everything required of him to secure an order authorizing him to sue, and that it was not granted. It is wholly immaterial that the complaint does not show a specific request for and express denial of such an order. A case was presented which made it the duty of the justice to make the order, but instead of doing so he made a wholly different order—one unwarranted by the facts, and one which he had no power to enforce. This may be regarded as a refusal to make the proper order and allowed the same effect.

The defendants are in no position to complain of this construction, for the order authorizing suit in any case in which the garnishee denies the alleged indebtedness is a mere form. Whether it is granted or denied, a right of action immediately accrues to the judgment creditor—and whether it is in form an action under the statute, or in equity because the statute has failed to afford relief, the issues are precisely the same.

Angellotti, J., concurred.

[L. A. No. 1932. Department Two.—February 29, 1908.]

ANAHEIM UNION WATER COMPANY et al., Appellants,
v. THEODORE ASHCROFT, IRA ASHCROFT, AN-
TONIO AROS et al., Respondents.

WATER-RIGHTS—USER OF DITCH BY COTENANTS—DECREE IN PARTITION—
EXTENT OF USER ON EACH TRACT.—Where several cotenants who
are severally in possession of portions of a rancho, which were
subsequently allotted to them in partition, constructed jointly a
ditch over the lands of one of them for use on their respective
lands, the extent of the easement of each over such lands is to be
determined by the extent of their user at the time of the partition
decree, unless a prescriptive title to a greater user has been there-
after acquired.

ID.—TITLE BY PRESCRIPTION—PROOF OF ADVERSE USER.—*Held*, that the
evidence is insufficient to show that the defendant Aros had acquired
a prescriptive title after the partition decree to any greater user
on his lands; but that the evidence is sufficient to sustain a finding
that the defendants Ashcroft had acquired by adverse user a pre-
scriptive title to irrigate their entire tract.

**ID.—EXPRESS DECLARATION OF ADVERSE USER NOT ESSENTIAL—SUFFI-
CIENCY OF PROOF.**—In order to support a title to an increase of
water by prescription, an express declaration of the adverse user
is not essential. It is sufficient that there is satisfactory proof
of a continuous, open, notorious, and uninterrupted use of the waters
on the lands of said defendants for the statutory period, of such
a character as unquestionably to indicate that the use was being
exercised in hostility to the right of any person to interfere with
its exercise.

APPEAL from a judgment of the Superior Court of River-
side County and from an order refusing a new trial. J. S.
Noyes, Judge.

The facts are stated in the opinion of the court.

Richard Melrose, and E. E. Keech, for Appellants.

Lafayette Gill, for certain Respondents.

G. R. Freeman, for certain Respondents.

LORIGAN, J.—The Santa Ana River flows along and
forms the southeasterly boundary of the Rancho el Rincon
in Riverside County. In 1870 the defendant Antonio Aros,

one of the parties to this action, and Vicente Fernandez, J. J. Alvarado, and Ynez Yorba de Cota, the predecessors in title of the other parties, were tenants in common of a large portion of said rancho, and severally in possession of particular tracts thereof, which were subsequently allotted to them in partition, and are referred to in this action as the Cota, Fernandez, Alvarado, and Aros tracts. In the year referred to all said cotenants entered upon the said Santa Ana River and jointly constructed a main ditch and diverted water from said stream down across the lands of the Cota tract. From this ditch Fernandez, Alvarado, and Aros severally constructed branches and diverted water upon their several tracts of land. These tracts in possession of Fernandez, Alvarado, and Aros lay upon Chino Creek, which flows southerly through them and constitutes a tributary of said Santa Ana River. The Fernandez tract lay south of the Aros tract and the Alvarado tract north of it. The Cota tract lay to the east of the lands in possession of these other tenants in common and along the Santa Ana River, and portions thereof were irrigated from such ditch constructed through said land. Portions of the lands of Fernandez, Alvarado, and Aros lying east of the Chino Creek were also irrigated by the use of said ditch and the branches therefrom conducting the waters of said Santa Ana River on to their lands. This use of said water continued until the year 1873, when, by a final decree of partition, the several tracts of land in possession of said cotenants were allotted to each of them in severalty. No mention whatever was made in the partition decree as to the ditch or ditches constructed over the lands, nor was reference made to any water or water-right.

The plaintiffs in this action are the successors in interest of J. J. Alvarado and Ynez Yorba de Cota to the Alvarado and Cota tracts. The defendant Aros is one of the original cotenants, the Aros tract of which he was in possession when the ditch was constructed and the water brought on his land having been allotted to him under the partition decree. The defendants Ashcroft succeeded to the interest of Vicente Fernandez, to whom the Fernandez tract was allotted.

The ditch referred to was variously known as the "Fernandez ditch," the "Durkee and Cota ditch," and the "Durkee

ditch." On the trial it was usually spoken of as the "Durkee ditch," and we shall refer to it by that name.

The amended complaint in the action, filed September 10, 1904, alleged the ownership of plaintiffs of their lands, the existence and use of the ditch over them, with branches extending upon the lands of the defendants Ashcroft and Aros; that the Ashcrofts were entitled to use said ditch for the purpose of conveying the waters of the river, in a reasonably prudent manner, for the irrigation of twenty-seven acres of their land, and that the defendant Aros was entitled to use said ditch in like manner for the use of forty acres of the Aros tract; that the Ashcrofts claimed the right to use, and without plaintiffs' consent had used, the ditch and its waters for the irrigation of all their land, and that the defendant Aros claimed the right, and without the consent of plaintiffs had used, the ditch for irrigating eighty acres of his land; that all the defendants intended and threatened to continue such use until they would acquire a right by prescription. The prayer of the complaint was that the defendants should be enjoined from irrigating more land than they were entitled to.

Both defendants answered, taking issue upon the amount of land they were entitled to irrigate from said ditch, the Ashcrofts alleging that they were entitled to irrigate their entire tract of land, and the defendant Aros that he was entitled to irrigate one hundred and twenty acres of the Aros tract. Defendants set up also that they had acquired against the plaintiffs by adverse use for the statutory period the right to water all their said lands, as alleged in their answers.

Findings and judgment were made and entered in favor of the defendants, the court finding that by adverse user the Ashcrofts were entitled to water from said ditch 98.78 acres of their land, and the defendant Aros had acquired, in the same manner, a right to irrigate from said ditch one hundred acres of his said land. The court further found that the defendants were the joint owners of an interest or easement in the premises of the plaintiffs, consisting of a right of way for the water of the ditch across the lands of plaintiffs in its usual carrying capacity, and of the right to conduct across the land of plaintiffs by means of such

ditch, upon the lands of the defendants, such quantities of water as were reasonably necessary to prudently and properly irrigate 98.78 acres of the lands of the Ashcrofts and one hundred acres of the lands of Aros; that said easement or servitude was attached to the several lots of land owned by the defendants, and the defendants were entitled to a decree quieting and establishing their right and title to said easement against the plaintiffs to that extent.

Plaintiffs appeal from the judgment and from an order denying their motion for a new trial, their motion having been based on the insufficiency of the evidence to sustain the findings, and that the decision was against law.

Preliminary to a consideration of the merits of the appeal it may be said that, according to maps used on the trial it appears that the lands of Ashcroft and Aros lay on either side of the Chino Creek, which runs southerly through them; that by far the largest portion of their lands lay to the east of said creek and nearest to the main ditch from the Cota tract constructed by the cotenants jointly, and from which the branches onto these lands to the east side of the creek were originally constructed by the cotenants severally in possession of them.

The entire tract belonging to the defendant Aros involved in this action and lying on either side of said creek contains 144.96 acres; the entire tract of the defendants Ashcroft, similarly located, consists of 98.78 acres. The land of Aros west of the Chino Creek, which he claimed he had the right to irrigate from the Durkee ditch, and which claim the trial court sustained, consists of 15.60 acres; the lands of Ashcroft on that side of said creek, which he also asserted he had the right to irrigate from said Durkee ditch, and which the findings of the court sustained, consisted of several pieces or fields. All the other lands of the defendants which the court found they were entitled to irrigate lay east of said Chino Creek. We refer to the particular situation of the lands of defendant Aros east and west of said creek, because in our opinion the findings of the court relative to them must be treated separately under the evidence as we have examined it.

This brings us to the merits of the appeal, and the contention of appellants thereon may be stated briefly; it is,

that by the decree in partition there vested in Fernandez and Aros an easement to use the Cota tract now belonging to plaintiffs, over which the Durkee ditch had been constructed and passed, in the same manner and to the same extent only as such property was obviously used for the benefit of their lands at the time they were allotted to them in severalty under such partition decree; that at that time the evidence shows Fernandez was using said Durkee ditch to irrigate, at most, but twenty-seven acres of land on the east side of said Chino Creek, and Aros, eighty acres of his land on the same side, and that no additional enlargement of the easement in favor of any lands of either has been acquired by prescription or otherwise.

The legal proposition asserted by appellants is undoubtedly correct. The cotenants, Cota, Alvarado, Aros, and Fernandez, before the partition, having by the joint construction of the Durkee ditch created an easement in the Cota tract for the benefit of the Aros and Fernandez tracts, such easement passed under the decree of partition, vesting these tracts in Fernandez and Aros, respectively, in severalty as appurtenant thereto. But the extent of the easement in the ditch over the Cota tract, which passed under the decree of partition as appurtenant to the Fernandez and Aros tracts is to be determined as of the time of said partition decree. The Cota tract was only impressed with an easement in favor of the other tracts to the extent that the ditch across it was, at the time of said decree, obviously and permanently used to irrigate lands of said tracts; it attached as an easement appurtenant only to such lands of the tract as had been actually irrigated from it. (Civ. Code, Sec. 1104; *Cave v. Crafts*, 53 Cal. 135.) Applying this rule here: As it is quite apparent from the evidence, as contended by appellants, that at the time of the partition decree not more than twenty-seven acres of the Fernandez tract now owned by the Ashcrofts, and not more than eighty acres of the Aros tract, were being irrigated from the Durkee ditch, the easement appurtenant to these tracts extended at the time of the partition decree to those quantities of land only upon which the water was being actually used. If a more extended easement than was appurtenant to these specific quantities of land in the tracts has been created, and be-

come appurtenant to other lands therein, it must have been created, as the court found, by prescription. And this brings us to a consideration of the main point made by appellant, that the evidence does not support the finding of the court that an easement as to such additional lands had been acquired by prescription.

Examining the evidence on this claim of appellants, first, as far as it affects the findings in favor of the defendant Aros. While in the complaint it is alleged that Aros had used the Durkee ditch to irrigate but forty acres of his tract at the time of the partition decree, the appellants now admit that at that date the evidence shows he was actually irrigating eighty acres east of the Chino Creek and concede that a finding of the court of an easement appurtenant to said eighty acres would have been unobjectionable. The finding of the court is a general one as to the acreage in favor of Aros; that he had acquired a prescriptive right to irrigate one hundred acres of his land without mention as to the location of said lands with respect to the Chino Creek. This finding, however, necessarily embraced within the land he was entitled to irrigate from said Durkee ditch the lands owned by him on the west side of the Chino Creek. This tract on the west was estimated by some of the witnesses as containing twenty acres of land which had been irrigated by Aros, and the court must have concluded that it contained that acreage because, as Aros only claimed to have irrigated eighty acres on the east side, in order to warrant the general finding that he was entitled to irrigate one hundred acres of land, the court must have found that he was entitled to irrigate twenty acres on the west side of the creek. It is apparent, however, that the statements of the witnesses that twenty acres on the west side of the creek were irrigated, were but estimates simply, as an actual survey made at the instance of defendants, and the accuracy of which was not questioned on the trial, clearly shows that but 15.60 acres could be or were, irrigated from the line of the originally constructed ditch as it then showed on the ground. This, however, in the view we take of the finding of the court, in as far as it includes any of the land of Aros west of the Chino Creek within the one hundred acres he is entitled to irrigate from said Durkee ditch, is unimportant.

While as we have said the finding is conceded by appellants to be sustained by the evidence as to the eighty acres east of the Chino Creek, it is strenuously contended that it is not sustained by the evidence as to any land included in it to the west, and we are satisfied that their claim in that respect is correct.

The original complaint in the action was filed in August, 1904. It is not claimed that Aros ever used any water from the Durkee ditch to irrigate his land west of the Chino Creek until 1897 or 1898, and the finding in his favor could only be sustained on evidence showing that prior to the commencement of the action he had acquired a right by adverse user of the waters of the ditch for the statutory period of five years. The evidence falls far short of any such showing. It is doubtful whether it was in 1897 or 1898 that he and others undertook to convey the waters of the Durkee ditch to the west side of Chino Creek. But assuming, as we must, in favor of the finding that it was in 1897, it then appears that in that year Daniel Durkee, predecessor in interest of plaintiffs to the Alvarado tract, and John Main, predecessor in title of the Ashcrofts to the Fernandez tract and Francisco Serrano, a tenant of Aros, put a flume across the Chino Creek near the north line of the Alvarado tract (then owned by Durkee) for the purpose of carrying water from the Durkee ditch to the lands of the Alvarado, Aros, and Fernandez tracts on the west side, and a portion of the lands of Aros on that side were irrigated therefrom that year. This flume was not a success and was taken out the next year, and Serrano and the Ashcrofts, who had then purchased from Main, took their portions of the flume and with them constructed another flume across Chino Creek near the boundary line between the Ashcroft and Aros properties. This flume when they undertook to use it, they found was not constructed high enough to convey the waters from the ditch, and the following year they raised the flume and brought the waters across, and Aros irrigated his lands therefrom; this was in 1899. This tract was again irrigated in 1901, and in that year the flume was destroyed by a flood occurring prior to August, 1901, and the tract not thereafter irrigated.

It is quite apparent from this evidence that no right by prescription to the use of the water of the Durkee ditch was acquired for the benefit of the lands of Aros to the west of Chino Creek. A continuous irrigation of this land for five years could not be found from the evidence. Assuming that the first flume above the Alvarado property was put in in January, 1897, which is the earliest date at which any witness places its construction, it was washed out in August, 1901, and never replaced. There were, therefore, not five years between those dates; there were at most something over four. And even during that time a flume had not been so constructed whereby Aros could have brought the water into the Durkee ditch to his land on the west side. Nor, even while the flume was capable of conducting water to the tract, was there a continuous use of it from said ditch for the irrigation of said lands during the period it could have been used. The flume constructed in 1898 was incapable of carrying the water across in that year, and during the period when the water could be carried on the lands its use there did not exceed three years—1897, 1899, and 1901.

From these considerations, while we are satisfied that the evidence sustains the finding of the court and is conceded in favor of Aros as to an easement appurtenant to the eighty acres of his land east of the Chino Creek, it does not sustain the finding as to a similar right in favor of the lands west of Chino Creek.

Now as to the Fernandez tract owned by the defendants Ashcroft. This tract was rented from John Main, heretofore referred to, by the Ashcrofts in 1898, and purchased by them from him in 1899. The evidence showed that from 1898 at least, and up to the commencement of this action, the Ashcrofts had irrigated their entire tract, as found by the court, both east and west of the Chino Creek from the waters of the Durkee ditch. The appellants admit that the evidence was sufficient to support the finding as to the area irrigated and the time for which it was used. Their claim is that the evidence does not sustain the finding that the use was open, notorious, or adverse, or under claim of right, and it is further insisted that the irrigation of said lands was not all had from the Durkee ditch.

As to the claim that there was no evidence of a claim of right to the use of the waters. There was some evidence of an express declaration by the Ashcrofts when using the waters that they were taking them to irrigate all their lands and that they had a right to do so. Appellants, however, question the efficacy of the evidence in that regard. But, assuming there was no express declaration, it was not essential to support a right by prescription that there should be. Satisfactory proof of a continuous, open, notorious, and uninterrupted use of the waters on their lands for the statutory period, and of such a character as to unquestionably indicate that the use was being exercised in hostility to the right of any person to interfere with its exercise, was sufficient proof that they claimed a right to use it. It was not necessary to declare such right any further than their conduct indicated it. And that the evidence shows that they irrigated all their lands continuously through the statutory period of five years from the Durkee ditch, and did so openly, notoriously, and uninterruptedly, and under a claim of right, is so obviously apparent from the evidence, that it would serve no useful purpose to discuss it.

While, as we have said, it is conceded by appellants that the finding of the court as to the area irrigated and the time for which the water was used is supported by the evidence, it is claimed that such irrigation was not entirely had from the Durkee ditch, and that such irrigation from it as was had was not open and notorious. This point is made under the evidence which discloses that for the entire statutory period during which the Ashcrofts were irrigating their land, in addition to the laterals run from the branch Durkee ditch, they also took the water from such branch near the northeast corner of their lands and ran it through a low place between their lands and the lands of Aros, conducting it into the Chino Creek above a dam which they had constructed across said creek. Having impounded the waters there, they then conducted part of them, by a gravity ditch having its intake above the dam, southerly along and across their lands on the east side of Chino Creek, and by means of a pump also pumped the water from said dam into a ditch on the west side of the creek and irrigated their lands situated thereon.

It is insisted by appellants that such taking was not open and notorious, but clandestine. We think not. If the Ashcrofts had constructed a ditch from the main branch ditch to the dam in Chino Creek and conducted the waters thereto, it could not be claimed that such a taking was not open and notorious. That they took the water directly from the branch ditch was entirely obvious. And if the trend of the land therefrom—the swale sloping towards Chino Creek—furnished a natural channel through which the waters could be conducted to the dam in the creek, there was no necessity to construct an artificial one. Nor can it be said that the impounding by the dam of the waters in Chino Creek and their conduct over the lands on the east by means of the ditch therefrom, and their distribution to the lands on the west from the pumping plant, was not equally open and notorious. The contention is, that as the Ashcrofts were riparian owners along both sides of the Chino Creek, their action in pumping and running water from the dam by means of the ditch would only indicate the exercise of a riparian right to the waters of Chino Creek. But, aside from the fact that they were turning the water for all these years from the main branch ditch into the dam during the irrigation season, and were taking water out of it for irrigation purposes, the evidence shows that during the irrigation season there is no water in the Chino Creek which can be utilized for practical irrigation. The evidence shows that all the water which would accumulate in the Chino Creek above the dam during the night, in the irrigation period, could be pumped out in an hour—at the most in an hour and a half; that it would not furnish anywhere near the amount of water plainly used by the Ashcrofts in irrigating their land from the dam during the irrigation season. The Ashcrofts could have done nothing further than was done by them, which would indicate to the plaintiffs that they were asserting a right to use the waters of the Durkee ditch by means of the impounding dam in the Chino Creek. And what was done was sufficiently open, as the court found, to meet the requirement of the statute of proof of that element in establishing a prescriptive right.

There is nothing further in the case requiring discussion.

The judgment and order as to the defendants Ashcroft are affirmed with costs. For the reason that the finding of the court that the defendant Aros was entitled to use the water of said Durkee ditch as an easement appurtenant to one hundred acres of his land is not sustained by the evidence, the order denying appellants' motion for a new trial as to him, and his tenant Serrano who is jointly sued with him, is reversed, as is also the judgment in their favor. Appellants to recover their costs.

Henshaw, J, and Sloss J., concurred.

[L. A. No. 2159. In Bank.—February 29, 1908.]

E. J. FLEMING, Petitioner, v. C. H. HANCE, City Treasurer of City of Los Angeles, Respondent.

POLICE COURT—CHARTER OF LOS ANGELES—VOID PROVISION NOT VALIDATED BY AMENDMENT TO CONSTITUTION.—Under the freeholders' charter of the city of Los Angeles, ratified by the legislature in January, 1889, there being no provision of the constitution then providing for a police court thereunder, the provision therein for a police court was void, *ab initio*, and was not revived or validated by the mere subsequent passage of the amendment to the constitution adding section 8½ of article XI, authorizing the creation of police courts by freeholders' charters.

ID.—PERMISSIVE AMENDMENT—POWER OF LEGISLATURE—EXPENSES OF JUDGES—CHARGE UPON CITY TREASURY.—The grant made in section 8½ of the constitution is merely permissive. If a freeholders' charter has, pursuant thereto, created a police court, the legislature cannot create within the city another police court maintainable at the city's expense. But where the city has not used such permission the legislature has power, under section 1 of article VI, to establish police or other "inferior courts" in any incorporated city or town, and to make the salaries and office expenses of the judges or justices thereof a charge upon the city treasury.

ID.—SALARY OF PROSECUTING ATTORNEY IN POLICE COURT—MUNICIPAL CHARGE—INVALID STATUTE.—The statute creating a police court in the city of Los Angeles, in so far as it provides that the salary of the prosecuting attorney required to attend thereupon and conduct all criminal cases therein, shall be a charge upon the city treasury, is invalid. The prosecuting attorney is no part of the court for that purpose; and in prosecuting public offenses of which it has

jurisdiction, he acts as attorney for the state, and his duties are not municipal in their nature because exercised within the city. The burden for such prosecutions is to be borne by state or county under the general law provided for in section 5 of article XI of the constitution, and cannot be made a charge upon the city.

Id.—VIOLATIONS OF CHARTER AND ORDINANCES—FUNCTION OF CITY ATTORNEY—"MUNICIPAL AFFAIRS"—CONTROL OF STATUTE.—As respects prosecutions for violations of the city charter and city ordinances, the regulation thereof by the city is a "municipal affair," within section 6 of article XI of the constitution; and where the city charter regulates that matter, and imposes the duty upon the city attorney to prosecute all such violations, the charter must control a general statute imposing such duties upon the district attorney, and such statute is ineffective.

Id.—PROSECUTORS AS DEPUTIES OF CITY ATTORNEY—SALARIES NOT A CITY CHARGE.—If the prosecuting attorney and his assistants, when acting at request of the city attorney, act as his deputies, that does not authorize them to enforce a claim against the city, where there is nothing in the charter or in any city ordinance allowing such deputies to receive salaries payable out of the city treasury.

APPLICATION for a Writ of Mandate to the Treasurer of the City of Los Angeles.

The facts are stated in the opinion of the court.

Hartley Shaw, E. J. Fleming, and Joseph Ford, *Amicus Curiae*, for Petitioner.

Leslie R. Hewitt, City Attorney, Lewis R. Works, Assistant City Attorney, and Emmet H. Wilson, Chief Deputy District Attorney, for Respondent.

SLOSS, J.—The petitioner applied to the district court of appeal for a writ of mandate directing the treasurer of the city of Los Angeles to pay the petitioner's demand for salary as prosecuting attorney of the police court of said city. The court of appeal, after a hearing following the issuance of an alternative writ, granted a peremptory writ, whereupon the matter was by this court ordered to be transferred here for hearing and determination.

No issue of fact is raised by the respondent, the only question being whether the facts alleged by the petitioner entitle him to the relief sought.

The legislature passed, in 1901, an act creating, in cities of the first and one-half class (to which the city of Los Angeles belongs) a police court, with jurisdiction over all misdemeanors committed in the city, as well as all proceedings for violation of any city ordinance and actions for the collection of licenses required by city ordinances. (Stats. 1901, p. 95.) Section 7 of the act provided for the appointment by the city attorney of a prosecuting attorney and an assistant prosecuting attorney of said police court, each to receive a salary payable out of the treasury of the city. It is made the duty of these attorneys to attend the sessions of the police court, and conduct on behalf of the people all prosecutions for public offenses. In 1907 this section was amended, the changes consisting in increasing the number of prosecuting attorneys from two to four, increasing their salaries, and giving the power of appointment to the district attorney of the county instead of the city attorney. The designation of the duties of the prosecuting attorneys was also changed in a manner to be mentioned hereafter. (Stats. 1907, p. 850.)

The petitioner was, pursuant to the provisions of this amendment, appointed by the district attorney of Los Angeles County as prosecuting attorney of the police court of the city, and performed services as such. It is conceded that he is entitled to receive the salary which he seeks by this proceeding to collect, if the statute making such salary payable out of the city treasury is not in conflict with the constitution.

Pursuant to the provisions of section 8 of article XI, of the constitution, the city of Los Angeles framed and adopted a freeholders' charter, which was ratified by the legislature in January, 1889. (Stats. 1889, p. 456.) This charter made provision for the establishment of a police court (Stats. 1889, art. X, p. 486), but inasmuch as section 8½ of article XI of the constitution, authorizing the creation of police courts by freeholders' charters, had not then been adopted, this provision was held to be inoperative. (*People v. Toal*, 85 Cal. 333, [24 Pac. 603]) And the fact that the constitution was subsequently amended by the addition of section 8½ did not operate to revive or validate the charter provision which was void from its inception. (*Ex parte Sparks*, 120 Cal. 395, [52 Pac. 715].)

The grant contained in section 8½ is permissive merely. Where a freeholders' charter has, pursuant to the authorization of that section, created a police court, the power of the legislature to create, within the city, another police court, maintainable at the expense of the city, is, as is held in *Graham v. Mayor etc. of Fresno*, 151 Cal. 465, [91 Pac. 147], at an end. But where, as is the case here, the city has not taken advantage of the permission extended by section 8½ to include in its charter a valid provision for the organization of a police court, the legislature still has, under section 1 of article VI, of the constitution, power to create police or other "inferior courts" in any incorporated city or town. In cities which have not assumed control of the subject-matter of such courts, the scope of legislative control remains, notwithstanding the adoption of section 8½, as broad as it was before. Nor is the legislative power as to such cities limited by the constitutional amendment of 1896 to section 6 of article XI, exempting charter cities from legislative interference in "municipal affairs." The theory of the *Graham* case is that where a city, pursuant to section 8½, does provide in its charter for a police court, the subject-matter of such provision becomes a municipal affair. But it has never been held, and there is no reason for holding, that the mere adoption of section 8½ makes the creation and organization of police courts a municipal affair as to a city governed by a freeholders' charter, where such charter has not dealt with the subject of police courts. In the absence of charter provision, the legislature retains the power originally vested in it with reference to inferior courts throughout the state.

It is thoroughly settled by the decisions of this court that the legislature had the power, prior to the constitutional amendments in question, not only to establish police, or other inferior courts, in municipalities, but to provide for the payment of the salaries and office rent of the judges or justices of such courts out of the city treasury. (*Jenks v. Council*, 58 Cal. 576; *Bishop v. Council*, 58 Cal. 572; *Coggins v. City of Sacramento*, 59 Cal. 599.) It would seem to follow, from the views above expressed, that in cities governed by charters which have made no provision for police courts (or other inferior courts exercising similar functions) the legislature may still, notwithstanding the adoption of section 8½ and

the amendment of section 6 of article XI of the constitution, provide that the city must pay the salaries of police judges or city justices created by general law.

It might be difficult if it were a new question, to reconcile the imposition upon the city of the burden of maintaining a "part of the judicial system of the state" (*People v. Cobb*, 133 Cal. 74, [65 Pac. 325]), with the well-established principle that, under our system, municipal funds can be appropriated only for municipal purposes. (*Conlin v. Board of Supervisors*, 114 Cal. 404, [46 Pac. 279]; *Graham v. Fresno*, 151 Cal. 465, [91 Pac. 147].) It is said in the majority opinion in *Graham v. Fresno*, that "the only ground upon which the decisions heretofore cited upholding the provision for the payment of salaries and office expenses of city justices by municipalities can be sustained is that such justices, under the law then in force, in addition to being justices of the peace with the same jurisdiction as township justices, were also police judges performing municipal functions." Whatever view may be taken regarding these decisions, we feel that they express the settled doctrine of this court, and that the power of the legislature to charge upon the city treasury the expense resulting from the establishment of police or other inferior courts (except in cities which have provided by charter for a police court) is no longer open to question.

If the legislature has, under section 1 of article VI of the constitution, power to establish this court, and to make its cost a charge upon the city treasury, is the prosecuting attorney a part of that court, the burden of maintaining which may, as we have seen, be imposed upon the city? If he is, his salary may, under the rule just stated, be made payable out of the city treasury. On the other hand, if he is not a part of the court, the question arises whether the prosecution of criminal causes in the police court is so far a duty of the municipality as to justify the legislature in imposing its cost upon the city.

We think it cannot be said that the prosecuting attorney is in any sense material to this inquiry, a part of the court. No doubt the presence of attorneys to aid the court is a usual if not an indispensable condition to the disposition of judicial business. Attorneys are frequently said to be officers of the court, in the sense that they have the privilege of presenting

the causes of their clients before the court, and are subject to its control in the performance of their duties. (*Cohen v. Wright*, 22 Cal. 315.) To this extent, all attorneys practicing before a court are its officers, but they are not, merely by reason of being licensed to practice in the courts, public officers. (*Cohen v. Wright*, 22 Cal. 315.) In criminal cases, the attorney representing the defendant is as much an officer of the court as is the attorney conducting the prosecution. Each represents a party to a controversy to be determined by the court. In the determination of this controversy the court is impartial; it is not concerned in the success of either party. The prosecuting attorney is, it is true, a public officer, but the public nature of his employment results from the fact that he represents the sovereign power of the people of the state, by whose authority and in whose name all prosecutions must be conducted. (Const., art VI, sec. 20.) It is his relation to his client, not to the court, that makes him a public officer. He does not perform a function of the court to any greater extent than his adversary does. In *Von Schmidt v. Widber*, 99 Cal. 511, [34 Pac. 109], a court is defined as "a tribunal presided over by one or more judges, for the exercise of such judicial power as has been conferred upon it by law." The attorneys who appear and represent parties in litigation are not a part of such tribunal, and the mere fact that the cost of maintaining the tribunal is a proper municipal charge does not authorize the legislature to impose upon the city the obligation of paying such attorneys.

It remains to be considered whether, without regarding the prosecuting attorney as a constituent part of the police court, the duties imposed upon him are so far municipal in their nature that their cost may be made a charge upon the municipal treasury.

By the provisions of section 7 of the act under consideration (as amended in 1907), it is made the duty of "said prosecuting attorney and said assistant prosecuting attorneys to attend the sessions of said police court and conduct on behalf of the people, all prosecutions of public offenses, both misdemeanors and felonies, of which said court has jurisdiction; except criminal cases arising upon violation of the provisions of the city charter or ordinances, which shall be prosecuted by said prosecuting attorney and assistants when

requested by the city attorney of said city, who may deputize said prosecutors for said purpose." Here are two classes of cases which it is, or may become, the duty of the prosecuting attorneys to conduct on behalf of the people: 1. Those involving a violation of the state law or a county ordinance; 2. Those involving a violation of the city law (charter or ordinance). The prosecution of the first class of offenses cannot be said to be any part of the duty of the municipality. The offenses are created by general state law or county ordinance, and are punishable under such law or ordinance whether committed within or without the limits of a municipality. The burden of so prosecuting is to be assumed by the state or the counties into which the state is, for governmental purposes, subdivided, and it has, in fact, always been so assumed in this state. The state has provided a general system of inferior courts, operating throughout every portion of each county, and having jurisdiction over offenses of this class. (Code Civ. Proc., secs. 103, 115.) The constitution (art. XI, sec. 5) requires the legislature to provide, by general and uniform laws, for the election or appointment, in the several counties, of district attorneys and to prescribe their duties. By general law it is made the duty of the several district attorneys to "conduct, on behalf of the people, all prosecutions for public offenses," in their respective counties. (Pol. Code, sec 4256; County Government Act, sec. 132, Stats. 1897, p. 488.) The duties thus uniformly imposed upon county officers do not become municipal in character merely because they are to be exercised within the limits of a city. The prosecution of offenses against the state law or a county ordinance not being, then, a municipal duty, the legislature cannot impose the cost of performing this function upon the city. "We are not aware," said this court, in *Conlin v. Supervisors*, "that it has been held, . . . that the legislature has power to appropriate the funds of a municipality to the discharge of an obligation against the entire state, or to direct the payment of such funds for any other purpose than pertains to the municipality itself." (See, also, *Sinton v. Ashbury*, 41 Cal. 525; *Hoagland v. Sacramento*, 52 Cal. 142; *Graham v. Fresno*, 151 Cal. 465, [91 Pac. 147].)

The qualified duty of prosecuting for violation of the charter or city ordinances, imposed upon the prosecuting

attorney by the act in question, presents a different question. It may well be said that prosecutions of this character, i. e., for offenses which are punishable solely by reason of the organic act or the legislative action of the city itself, may properly be regarded as included within the functions of the city, and so to be paid for by it. But the city has, in its charter, assumed and provided for this duty. By section 49 of the Los Angeles charter (Stats. 1889, p. 472), it is made the "duty of the city attorney to prosecute in behalf of the people all criminal cases arising upon violations of the provisions of this charter and city ordinances." If the prosecution of such offenses is a part of the duty of the city; in other words, if it is a "municipal affair," this provision of the charter must control as against an act of the legislature, by reason of the constitutional amendment exempting charters from legislative control in municipal affairs. (Const., art. XI, sec. 6.) The two provisions, that of the charter and that of the statute, are necessarily inconsistent and cannot both be operative. If the city attorney is to prosecute *all* cases of this character, none can remain which are to be conducted by the prosecuting attorneys. It is suggested that the prosecutors, when acting at the request of the city attorney, become his deputies, and therefore act for him. But the charter certainly does not contemplate that any officer shall have power to appoint assistants or deputies who shall receive salaries out of the city funds, unless provision for such appointments and salaries has been made either by the charter itself or by ordinance. (Secs. 16, 66.)

It follows that as no municipal function is to be performed by the prosecuting attorneys appointed under this act their salaries cannot be made a charge on the city treasury, and that the act, in so far as it attempts to so direct the payment of such salaries, is inoperative and void. This conclusion is in no way affected by the fact that the fines imposed by the police court are, under section 6 of the act establishing the court (Stats. 1901, p. 96.) paid into the city treasury. The legislature was not bound to turn this source of revenue over to the city; but its doing so did not authorize it to compel the city to pay expenses not properly chargeable to it. The salaries in question are not payable out of the fines collected, nor is the obligation to pay them made contingent upon the

presence in the treasury of enough money, derived from fines, to pay them. It is, therefore, immaterial, that in the past year the amount of fines collected may have exceeded the total of all salaries payable under the act.

The views expressed make it unnecessary to consider further points urged in opposition to the granting of the relief here sought.

The writ is denied and the proceeding is dismissed.

Angellotti, J., Lorigan, J., Henshaw, J., McFarland, J., and Beatty, C. J., concurred.

Mr. Justice Shaw, deeming himself disqualified, does not participate in the foregoing.

[S. F. No. 4527. Department Two.—March 5, 1908.]

TERESA CASSERLY, Appellant, v. COUNTY OF ALAMEDA, Respondent.

PUBLIC SQUARES—PARTITION DEEDS BETWEEN COTENANTS—ADOPTION OF MAP SHOWING SQUARES—DEDICATION—ABANDONMENT TO PUBLIC USE.—Where all the tenants in common of a tract of land made partition deeds thereof, in 1853, adopting a particular map of the town of Oakland, as part of their confirmatory deeds, on which two blocks of the tract were designated as public squares, which the town of Oakland was then in possession and use of as such, and which were excluded from their partition deeds, the adoption of such map by them was the equivalent either of a formal dedication of the land to public use, or at least to an abandonment thereof to such use.

ID.—ADVERSE POSSESSION OF SQUARES BY TOWN, CITY AND COUNTY—PRESCRIPTIVE TITLE AGAINST DEVISEE OF COTENANT.—The adverse open, notorious, and exclusive possession and use of such public squares, by the town and city of Oakland from 1852 to 1874, and by the county of Alameda pursuant to an act of the legislature, from 1874, when county buildings were erected thereon and maintained by the county adversely to all the world for the further period of more than twenty-nine years, and for twenty-seven years after the patent of the United States was issued to the original owner of the Mexican grant, under whom the cotenants making the partition deeds acquired title, gives the county a perfect prescriptive title in the squares, under the statute of limitations, as against

an action thereafter by a devisee of one of its cotenants to quiet title to a fractional share therein.

ID.—STATUTE OF LIMITATIONS AGAINST COTENANTS.—The statute of limitations will run in favor of tenants in adverse possession, even as against their cotenants.

ID.—STALE DEMAND.—The commencement of the action to quiet title to a fractional interest in the public squares after such a lapse of time, is the presentation of a stale demand, irrespective of the statute of limitations.

APPEAL from a judgment of the Superior Court of Alameda County, and from an order denying a new trial. John Ellsworth, Judge.

The facts are stated in the opinion of the court.

James T. Boyd, and John B. Casserly, for Appellant.

U. S. Webb, Attorney-General, Geo. A. Sturtevant, Deputy Attorney-General, J. J. Allen, District Attorney, Everett J. Brown, succeeding District Attorney, and Walter J. Burpee, Deputy District Attorney, for Respondent.

McFARLAND, J.—Plaintiff brought an action to quiet her title to one thirty-sixth interest in two blocks of land in the city of Oakland. The defendant set forth its claim of title, and pleaded special defenses of the statute of limitations, adverse possession, dedication of the property to the town of Oakland, estoppel *in pais*, and laches. Judgment was in favor of the county of Alameda, and plaintiff appeals.

The land in controversy was originally a part of the Rancho San Antonio granted by Spain to Luis Peralta. Through the Peraltas, Eugene Casserly (through whom plaintiff claims as devisee), John C. Hays, Joseph K. Irving, and others obtained title. The lands in controversy were two blocks in the town of Oakland as laid off on Kellersberger's map thereof. Casserly, Irving, Hays, and others as tenants in common of these lands effected by agreement a partition thereof. They adopted Kellersberger's map of the town of Oakland as a part of the confirmatory deeds which they exchanged. In dividing the land as shown upon this map they drew the blocks by lot. The blocks on Kellersberger's map were numbered, saving certain ones which were designated as

public parks or squares. The blocks in controversy were not drawn for partition and were not named in the confirmatory deeds. Upon Kellersberger's map the blocks were designated respectively as Washington and Franklin squares. The apparent and sufficient reason why these lots were not mentioned in the confirmatory deeds was that at and before this time, the town of Oakland was using these blocks as public squares, and continued to use them, fencing them and treating them in all respects as property of the city from 1852 until February 1874, when the legislature passed an act enabling the board of supervisors of the county of Alameda to erect county buildings on Washington and Franklin plazas. (Stats. 1873, pp. 58, 59.) The act provided for the grant of Washington and Franklin plazas by the city of Oakland to the county of Alameda. The city then executed its deed to the county which was duly recorded, and in March, 1874, the county of Alameda went into the actual occupation of all of this land, and has openly, notoriously, under claim of right, and adversely to all the world continued in the full and complete occupation of it ever since. Upon it are erected its county buildings, courthouse, jail, recorder's and county clerk's offices, etc. The partition deeds were executed in August, 1853. From that date until the commencement of this action the county of Alameda and its predecessors in interest, the town and city of Oakland, have always exercised full and complete ownership and dominion over this property. As public property it has never been assessed for the payment of taxes. Thus, for a period of more than fifty years, it has been held and used under claim of ownership adverse to plaintiff's title. These two blocks were not embraced in the partition deeds, and much force attaches to the argument that the failure to do this, coupled with the adoption of the Kellersberger map indicating these blocks as public squares, was the equivalent either of a formal dedication of the land to public use, or at least to an abandonment to such use. Thus in *People v. Blake*, 60 Cal. 497, this court, speaking in reference to this map, said: "Now, when the original owners of the land made the Kellersberger map, or which was equivalent to the same thing, adopted and had recorded the map made by the original squatters, they thereby dedicated to the public use all the streets and public squares to the extent as designated upon

the map." But we need not be at pains to elaborate on the question of dedication, for indisputably the claim of plaintiff is barred by the statute of limitations, and is a stale demand in equity. The use of the town of Oakland of these blocks as public squares, antedating the exchange of the partition deeds, the designation upon the map of these blocks as public squares, the acquiescence and acceptance of the partitioners in this as shown by their adoption of the Kellersberger map, and of their failure to include the blocks in controversy in their deeds, the continued exclusive use and holding by the town of Oakland and subsequently by the city of Oakland of these blocks as public property of the city, the subsequent legislative enactment empowering the city to convey to the county, the conveyance to the county, the erection of the public buildings upon the land, one and all were open and notorious acts of ownership, conveying to all the world information of the good faith of the municipal corporations and of their claim of exclusive ownership and their exercise of absolute dominion over the property. So far as the county of Alameda is concerned, it has exercised these acts of ownership for a period of more than twenty-nine years before plaintiff commenced her action, and for twenty-six years after the patent of the United States was issued to Don Vicente Peralta. In fact and in law it cannot be contended that the city's possession, and subsequently the county's, was that of a tenant in common with the plaintiff. Every act was in hostility to such a contention, and the statute of limitations will run in favor of tenants in adverse possession, even against their cotenants. (*Gregory v. Gregory*, 102 Cal. 53, [36 Pac. 364].) It is concluded, therefore, that appellant's action was undoubtedly barred by the statute of limitations. (Code Civ. Proc., secs. 318, 319, 323, 324, 325.) The commencement of such an action as this after such a lapse of time, irrespective of the statute of limitations, is the presentation of a stale demand. (*Seculovich v. Morton*, 101 Cal. 676, [40 Am. St. Rep. 106, 36 Pac. 387].)

For which reasons the judgment and order appealed from are affirmed.

Henshaw, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[S. F. No. 4717. Department Two.—March 5, 1908.]

ANN M. BEEBE, Respondent, v. OLIVER C COFFIN et al., Appellants, and HENRY W. BEEBE, as Administrator of the Estate of WM. S. BEEBE, Deceased, Respondent.

GIFT—DELIVERY—RELEASE OF DOMINION AND CONTROL—GIFTS CAUSA MORTIS—A gift is a transfer of personal property made voluntarily and without consideration, and a verbal gift is not valid unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery. The delivery must be absolute, that is, the donor must not only part with the possession of the property, but must relinquish to the donee all dominion and control over it. These requirements hold true of all gifts, whether they be gifts *inter vivos* or gifts *causa mortis*. If the transfer of such dominion and control is postponed to some future date, as until the date of the death of the donor, it becomes thereby no more than an unexecuted and unenforceable promise to make a future gift.

ID.—DISTINCTION BETWEEN GIFTS CAUSA MORTIS AND INTER VIVOS.—The single vital distinction between a gift *causa mortis* and a gift *inter vivos* is that the former, being in its nature testamentary, is subject to the donor's revocation while he lives.

ID.—DELIVERY OF RELEASE OF MORTGAGE—INCOMPLETE GIFT.—A mortgagee inclosed a release and satisfaction of the mortgage in a sealed envelope, and delivered the same to the mortgagor, who had no actual knowledge of what the envelope contained, with instructions which limited its taking effect until after the death of the mortgagee. During the life of the mortgagee, the envelope remained in his safe deposit box, subject to his call. *Held*, that the facts were insufficient to establish a gift *causa mortis* of the mortgage indebtedness.

APPEAL from an order of the Superior Court of Alameda County refusing a new trial. F. B. Ogden, Judge.

The facts are stated in the opinion of the court.

J. C. Coogan, for Appellants.

Campbell, Metson, Drew, Oatman & Mackenzie, and Robert B. Gaylord, for Respondent.

McFARLAND, J.—This is an appeal taken by Oliver C. Coffin and Ella F. Coffin, his wife, from the order of the court denying their motion for a new trial. The action was commenced by Ann M. Beebe, to foreclose a mortgage given by the Coffins to secure their promissory note for one thousand eight hundred dollars. Henry W. Beebe, as administrator of the estate of William S. Beebe, deceased, filed his answer and cross-complaint, setting up an assignment by Ann Beebe to his intestate of the note and mortgage. The Coffins answered, likewise setting up an assignment of the note and mortgage by Ann Beebe to William S. Beebe, deceased, and further pleaded a satisfaction and release executed by William S. Beebe. The court found that Ann Beebe had assigned the note and mortgage to William S. Beebe, but further found that the release and satisfaction, execution of which had been pleaded by the Coffins, had not been delivered by William S. Beebe to them or either of them, and ordered judgment in foreclosure in favor of Henry W. Beebe, administrator of William S. Beebe's estate. The case is one turning upon the completeness of the execution of an attempted gift *causa mortis* by William S. Beebe to the Coffins. The case is free from the slightest doubt or taint of fraud. It may not be gainsaid from the evidence that William S. Beebe did attempt to give to the Coffins, or to Oliver C. Coffin, a release of the debt, and the single question in the case is whether the court erred in holding that the attempted gift was incomplete and therefore nugatory.

The facts, concerning which there is no controversy, are that the Coffins executed a note and mortgage to Ann Beebe. William Beebe took an assignment of the note and mortgage to himself. Oliver Coffin was the trusted friend and business agent of William Beebe. Beebe procured a safe deposit box in the joint name of Coffin and himself, and therein were placed valuable personal properties of Beebe. Coffin was given the keys to the box. Whenever Beebe wanted any of his valuables he would so inform Coffin, and Coffin would open the box and bring them to him. The rent of the box was paid by Beebe. The Coffins, by direction of Beebe, paid the interest on the note and mortgage to Ann Beebe after William Beebe had taken the assignment of the note and mortgage. Beebe was in ill health and seemed to be making provision for the

disposition of his properties in the event of his death. He would make separate packages of the contents of the box and give Oliver instructions as to the dispositions to be made of them. From time to time he would instruct Oliver to bring him the contents of the box, and, after examination, he would make changes in his dispositions and directions. Upon one of these occasions he handed to Coffin a sealed envelope bearing Coffin's name, saying, "Here, Oliver, you take this. I shan't want it any more. You take it and take care of it and put it in the safe deposit with your other things, and when the end comes you follow my instructions." Up to the time of Beebe's death Coffin had no positive knowledge of the contents of the envelope, but by inference, gathered from statements of Beebe, he believed that the envelope contained a release of the note and mortgage. After Beebe's death he opened the envelope and found in fact that it did contain such release, together with a note signed by Beebe and reading as follows: "Oliver C. Coffin: This document is to be placed on record immediately after my death, which cancels all claims from any source, either principal or interest." After Beebe had given Coffin this sealed envelope Coffin continued to pay the interest upon the note, as theretofore, to Ann Beebe, and so continued to do until the death of William Beebe. He testifies that he did this under William Beebe's instructions, William Beebe at the same time cautioning him not to pay any of the principal. Beebe never told Oliver that he had executed to him a release.

A gift is but the transfer of personal property made voluntarily and without consideration and a verbal gift is not valid unless the means of obtaining possession and control of the thing are given, or, if it is capable of delivery, unless there is an actual or symbolical delivery. (Civ. Code, secs. 1146, 1147.) And the delivery must be absolute; that is, the donor must not only part with the possession of the property, but must relinquish to the donee all dominion and control over it. (14 Am. & Eng. Ency. of Law, p. 1019; 20 Cyc. of Law and Proc., p. 1195.) This holds true of all gifts, whether they be gifts *inter vivos* or gifts *causa mortis*. As is pointed out in *Knight v. Tripp*, 121 Cal. 674, [54 Pac. 267], all gifts are necessarily *inter vivos*, since a living donor and a living donee are indispensable to a valid gift; but when the gift is

made in contemplation of impending death, and as a provision for the donee in the event of such death, it is called a gift *causa mortis*. "This designation of its character does not, however, change the elements requisite for rendering the gift complete. There can be no gift without an intention to give, and a delivery either actual or constructive of the thing given." (*Knight v. Tripp*, 121 Cal. 674, [54 Pac. 267].) Thus it cannot be too clearly borne in mind that the single vital distinction between a gift *causa mortis* and a gift *inter vivos* is that the former, being in its nature testamentary, is subject to the donor's revocation while he lives. But the essential of delivery, of the immediate surrender of all dominion and control over the subject of the gift, is as absolutely necessary in the one class of gifts as in the other. Falling short of such unconditional delivery, a gift is incomplete. If the transfer of such dominion and control is postponed to some future date, as until the date of the death of the donor, it becomes thereby no more than an unexecuted and unenforceable promise to make a future gift. (*Hibbard v. Smith*, 67 Cal. 547, [56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46]; *Daniel v. Smith*, 64 Cal. 346, [30 Pac. 575]; *Zellar v. Jordan*, 105 Cal. 143, [38 Pac. 640]; *Hart v. Ketchum*, 121 Cal. 426, [53 Pac. 931]; *Pullen v. Placer Co. Bank*, 138 Cal. 169, [94 Am. St. Rep. 19, 66 Pac. 740, 71 Pac. 83].) In illustration of the important fact that immediate and complete dominion over the thing given must be surrendered by the donor and accepted by the donee, the cases of *Pullen v. Placer Co. Bank*, and *Basket v. Hassell*, 107 U. S. 602, [2 Sup. Ct. 415], are instructive. In *Pullen v. Placer Co. Bank*, a father had given his son a check for one thousand dollars, upon the understanding that the son should not present the check to the bank for payment until after the death of the father. The son retained possession of the check and did present it according to instructions after the father's death. This court held the transaction invalid as a gift, citing *Knight v. Tripp* above referred to, and saying: "A gift vests the donee with the absolute property in the thing given, and is no longer subject to the control of the donor. If, on the other hand, the thing given remains under the control of the donor, or, except in the case of a gift *causa mortis*, is subject to his revocation, his gift is not complete. There is no difference, however, in this

particular between a gift *inter vivos* and a gift *causa mortis*. In either case it is not complete unless there is an actual or symbolical delivery to the donee of the thing to be given. In the present case the gift was verbal, and the property which the father intended to give to his son was money on deposit in the bank. The check was not itself the property which the father intended to give, but was merely a direction to the defendant to pay one thousand dollars to the son. . . . The check was not a symbolic delivery of the money, but it was a delivery of the means by which the son could obtain possession of the money. It was, however, subject to revocation by the father at any time before its presentation to the bank, and was in fact revoked by his death." In *Basket v. Hassell*, 107 U. S. 602, [2 Sup. Ct. 415], it is said: "The instrument or document must be delivered to the donee, so as to vest him with an equitable title to the fund it represents, and to divest the donor of all present control and dominion over it, . . . and a delivery which does not confer upon the donee the present right to reduce the fund into possession by enforcing the obligation according to its terms will not suffice."

Measured by these indisputable standards, the conclusion is irresistible that the attempted gift in this instance fell short of completeness. The release was in a sealed envelope. The donee had no actual knowledge as to what the envelope contained. Still less did he have any present and absolute right to such dominion and control over the release as would have justified him in placing it of record during the lifetime of Beebe. Both parties to it concurred in the understanding that the transaction, whatever it was, evidenced by the sealed envelope, was not to take effect until after Beebe's death, and the sealed envelope remained in Beebe's box with Beebe's other personal effects, subject to his call, and subject also to such change in disposition as he might decide to make of it, and as in fact he did make of other of his personal effects therein contained. Under circumstances thus shown, the finding of the court against the completeness and delivery of the attempted gift may not here be disturbed, for which reason the order appealed from is affirmed.

Henshaw, J., and Lorigan, J., concurred.

[Sac. No. 1586. In Bank.—March 6, 1908.]

**RICKEY LAND AND CATTLE COMPANY, Appellant, v.
C. P. GLADER, Respondent.**

WATER-RIGHTS—JUDGMENT ORDERED FOR PLAINTIFF—FINDINGS—EXCUSABLE NEGLECT TO PROCURE AND ENTER JUDGMENT—DISMISSAL—ABUSE OF DISCRETION.—Where the court after trial of an action by a riparian owner to enjoin a diversion of the stream, ordered judgment for plaintiff, and detailed findings were prepared by a non-resident attorney, and sent to associate counsel for signature and judgment, and in the absence of such counsel, an inexperienced attorney in his office secured the signed filing of the findings, but by excusable neglect failed to obtain and enter judgment for more than six months, it was an abuse of discretion for the court, on motion of defendant, who, as a continuing trespasser, was not injured, but benefited by the delay, in entering judgment enjoining the trespass, to dismiss the action for such neglect, and thereby deprive the plaintiff of the just fruits of a judgment to which he was entitled.

ID.—APPEAL FROM DISMISSAL AFTER SIXTY DAYS—REVIEW OF EVIDENCE BEFORE TRIAL COURT—CONSTRUCTION OF CODE.—Though the appeal from the judgment of dismissal was taken after the lapse of sixty days, the court may review the evidence which was before the trial court when the dismissal was ordered. Such judgment, being without findings, and without an opportunity to the appellant to prepare a record, under sections 648 and 649 of the Code of Civil Procedure, is not an "exception to the decision or verdict" within the meaning of section 939 of the Code of Civil Procedure.

APPEAL from a judgment of the Superior Court of Mono County dismissing an action. J. D. Murphy, Judge.

The facts are stated in the opinion of the court.

James F. Peck, Wm. O. Parker, and Chas C. Boynton, for Appellant.

R. S. Miner, and J. P. Langhorne, for Respondent.

HENSHAW, J.—Plaintiff, the owner of certain lands in Mono County riparian to a watercourse, brought its action to enjoin defendant from illegally diverting the waters of this stream above plaintiff's land. The action was tried before the court and submitted. Thereafter the court, after

mature consideration, ordered judgment for plaintiff, decreeing that each party should bear and pay its own costs. Detailed findings and conclusions of law were signed and filed upon the nineteenth day of August, 1905. No judgment was entered and no request that a judgment be entered was made within the six months thereafter, as contemplated by section 581, subdivision 6, of the Code of Civil Procedure. On the tenth day of March following the defendant moved the court to dismiss the action, under the authority of this section. The court granted the motion and a judgment of dismissal was entered. From this judgment of dismissal plaintiff has appealed, taking his appeal more than sixty days after the entry of the judgment. To the hearing of the appeal respondent first objects that the evidence which was before the trial court may not here be considered, since the appeal was taken more than sixty days after the rendition of the judgment. (Code Civ. Proc., sec. 939.) But a judgment of dismissal such as this, without findings of fact and without opportunity to the appellant to prepare a record, as contemplated and required by sections 648 and 649 of the Code of Civil Procedure, is not "an exception to the decision or verdict" within the contemplation of section 939, Code of Civil Procedure. (*Falkner v. Hendy*, 107 Cal. 52, [40 Pac. 21, 386].) In such a case as this, either this court must have the power to review the judgment of dismissal upon the evidence which was before the trial court, or the right of appeal becomes a vain and empty thing, and the decision granting a motion to dismiss, which motion under the statute is addressed to the discretion of the court, can never be corrected, however glaring the abuse of such discretion may be.

With the evidence then before us, we come to consider whether or not in this instance the court did abuse its discretion in granting the motion.

In the years that section 581, subdivision 6, of the Code of Civil Procedure, has been a part of the law of this state, no case has come before this court where a dismissal has been granted under it. In every case where a dismissal of the action has been denied, the discretionary ruling of the trial court has been upheld. (*Neihaus v. Morgan*, (Cal.) 45 Pac. 255; *Rosenthal v. McMann*, 93 Cal. 505, [29 Pac. 121];

In re McDevitt, 95 Cal. 17, [30 Pac. 101]; *Marshall v. Taylor*, 97 Cal. 422, [32 Pac. 515]; *San Jose R. Co. v. San Jose L. & W. Co.*, 126 Cal. 322, [58 Pac. 824].)

Coming then to consider whether or not, under the facts presented, the court abused its discretion in dismissing the action, it is made to appear that the plaintiff was represented by attorneys having offices in different counties. The action was tried in Mono County. One of these attorneys was William O. Parker, whose office was at Bridgeport, the county seat of Mono County. James F. Peck, another of the attorneys, had his office in San Francisco. On him was imposed the duty of the preparation of the findings of fact and conclusions of law. This duty he performed, forwarding these papers to his associate, Mr. Parker, at Bridgeport. Mr. Parker at the time was absent from the state. In his office was his son, a young attorney. He, in the absence of his father, caused the findings of fact and conclusions of law to be filed, but failed and neglected to demand judgment. Mr. Peck and Mr. Parker both believed that judgment had been entered, and received no intimation to the contrary until served with notice of motion for dismissal of the action. Immediately upon receiving this notice they sought to have judgment entered, but were refused. We have, then, a case fully and elaborately heard upon its merits, after trial consuming three weeks of time. We have abundant evidence that the neglect or inadvertence of appellant's attorneys did not arise either in wantonness or indifference, but was the result of the unexpected circumstance that the matter of demanding judgment was left to a young and inexperienced attorney, who failed to make the demand. Under such circumstances it will unhesitatingly be said that it was an abuse of discretion of the court to dismiss an action and to deprive a litigant of the just fruits of a judgment to which he was entitled after full and fair trial, unless, upon the other hand, some injury and wrong may be shown to have resulted to the moving party, which would render it inequitable that a judgment, after the lapse of six months, should be given to the prevailing party. Otherwise not a dismissal of the action, but, at the most, the imposition of terms for the entry of a judgment, is all that justice could require.

We look in vain, however, to discover any injury which respondent could have suffered by appellant's failure to have the judgment entered, and, indeed, as disclosed, not only did respondent suffer no injury, but he received a positive benefit. First, as to injury, it may be said in passing, that respondent himself could have prevented any by a demand upon his part that judgment be entered, and the fees for such entry would have been recoverable against plaintiff in the event of success upon appeal. That the defendant sustained no injury by the failure to enter judgment, but in fact was benefited thereby, is made apparent from the following facts: The order for judgment declared him a trespasser, illegally depriving plaintiff of the waters of a stream. Until such judgment was entered, he was under no legal duty to cease his trespass. So long, then, as the judgment remained unentered, he could, and doubtless did, continue in the use of water to which the findings and conclusions of the court decreed that he was not entitled. That this is clearly so is demonstrated by the correspondence which passed between defendant and his attorneys touching the appeal in the case. In one of these letters (contemplating an appeal) it is said: "You can get use of water for two or three years. Might get a compromise, as it would cost Rickey quite a sum to fight the appeal." And Mr. Miner, attorney for defendant, testifies at the hearing: "After that time my client wanted to know if there was an injunction against him using the water, and if he would be guilty of contempt of court in using it." As suggested by one of the foregoing quotations, an appeal, if taken, would have been for vexatious delay and to force a compromise. This is even more plainly shown by further letters from the defendant's attorney to his client. Thus he writes. "It is for you to decide if it is worth the cost, which would be five or six hundred dollars by the time it went through the supreme court, and unless that court modifies its decision on riparian rights you would lose." Again, "As I wrote you before, it will cost from four to six hundred dollars to carry the case through the supreme court and to try to get that court to modify the doctrine of riparian rights." And finally defendant's attorney testifies: "As an inducement on my part which might influence Rickey to settle the Glader case, I stated to Mr. Parker, in substance,

something to the effect that in any event if Rickey did not settle the Glader case, we would appeal from the judgment and keep the case going for some time." Bearing in mind that respondent on this appeal was not deprived even of costs, since by the order for judgment each side was to bear its own costs, it is manifest that he was injured in no way, but was positively benefited by the failure of plaintiff to have the judgment recorded.

The judgment of dismissal is reversed and the cause remanded with directions to the trial court to permit plaintiff, upon payment of proper costs, to cause entry of judgment to be made in consonance with the findings of fact and conclusions of law heretofore filed in the action.

Shaw, J., Sloss, J., Angellotti, J., and Lorigan, J., concurred.

[S. F. No. 4642. Department Two.—March 9, 1908.]

GEORGE ENGWICHT, Respondent, v. PACIFIC STATES LIFE ASSURANCE COMPANY, Respondent, and TRUMAN REEVES, Treasurer of State, Appellant; J. H. T. WATKINSON, Intervener, Respondent.

LIFE INSURANCE—ASSESSMENT PLAN—TRUST FUND—"CONTRACT HOLDERS"—CONSTRUCTION OF STATUTE—DEBENTURE CONTRACTS—OPTIONS.—Under the provisions of the law of 1891 (Stats. 1891, p. 126), regulating life insurance by corporations formed to carry on the business of "mutual insurance on the assessment plan," and requiring the deposit of a secured trust fund, the securities for which were to be deposited with the state treasurer, and the principal sum was to be "held in trust for the contract holders of such corporation," the term "contract holders" imports holders of contracts of life insurance, and does not include general creditors, or holders of "debenture contracts," who have loaned money thereto, with mere options at maturity to take a life annuity, or, if in health, a paid up policy, and who have no interest in the trust fund, until all holders of insurance have been paid therefrom.

ID.—ACTION BY HOLDER OF INSURANCE TO CHARGE FUND—CREDITORS' BILL—NECESSARY PARTIES—ACTION BY COURT—INTERPLEADER.—All holders of contracts of insurance are entitled to share ratably

in the trust funds; and they are all necessary parties to a distribution thereof, which cannot be had except upon a bill in equity in the nature of a creditor's bill. One of them may invoke the aid of equity in enforcing his demand, but the court, with the corporation defendant and its books before it, should determine what other persons are entitled to share in the trust fund, and invite or compel their presence and participation by interpleader.

ID.—POWER OF COURT UPON HEARING OF CREDITOR'S BILL—DISTRIBUTION OF FUND—RECEIVER.—Upon the hearing of the creditor's bill, with all the parties interested in the fund before it, the court may make equitable distribution of the funds, and may appoint a receiver to carry that distribution into effect.

ID.—SUBSTITUTE METHOD NOT PERMISSIBLE.—The method adopted by the courts, of appointing a receiver at the instance of one party, with a command to all persons claiming any interest in the fund to appear and show cause within sixty days, is not a permissible substitute for bringing them all in as necessary parties to the distribution.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order appointing a receiver. John A. Hosmer, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, and Geo. A. Sturtevant, Deputy Attorney-General, for Appellant.

Under the causes of action alleged in the complaint and by the intervener, the court had no jurisdiction to appoint a receiver of the trust fund. (Civil Code sections 453 d. and p.; Code of Civil Procedure, sec. 564; *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121; *State Inv. etc. Co. v. Superior Court*, 101 Cal. 135, 35 Pac. 549; *San Jose Bank v. Bank of Madera*, 121 Cal. 543, 54 Pac. 85; *White v. White*, 130 Cal. 599, 80 Am. St. Rep. 150, 62 Pac. 1062.) The intervener had no standing as such to intervene. (Code Civ. Proc., sec. 387. *Bilby v. McKenzie*, 112 Cal. 143, 44 Pac. 341; *Isaacs v. Jones*, 121 Cal. 257, 53 Pac. 793, 1101; *Rossi v. Superior Court*, 114 Cal. 371, 46 Pac. 177; *Wheat v. Bank of California*, 119 Cal. 4, 50 Pac. 842, 51 Pac. 47.) The intervener has no contract of life insurance, but one of loan merely. The options do not affect its character. The respondents have no lien on the funds in the hands of

appellant. (*San Francisco Savings Union v. Long*, 123 Cal. 107, 55 Pac. 708.)

Jellett & Meyerstein, for Plaintiff, Respondent.

The plaintiff had the right to institute this suit, and if there were other claimants they should have been set up in the answer, and have been brought in as parties. (*Kruger v. Life and Annuity Assoc.*, 106 Cal. 98, 39 Pac. 213; *San Francisco Savings Union v. Long*, 123 Cal. 110, 55 Pac. 708.)

Aitken & Aitken, for J. H. T. Watkinson, Intervener, Respondent.

The contract with plaintiff ran for life insurance at a single premium, in the nature of endowment insurance. (Cook on Life Insurance, sec. 107; 11 Am. & Eng. Ency. of Law, 2d ed., p. 26; *Endowment & Benevolent Soc. v. State*, 35 Kan. 253, 10 Pac. 872, 878; *San Francisco Savings Union v. Long*, 123 Cal. 115, 118, 55 Pac. 708; *Briggs v. McCulloch*, 36 Cal. 542.)

THE COURT.—Plaintiff brought his action as a policyholder against the defendant life assurance company, to have determined the amount due him under his policy, to have that amount declared a lien upon the fund of five thousand dollars on deposit with the defendant Reeves as state treasurer of the state of California, and to have judgment that the state treasurer pay the same out of the trust fund of five thousand dollars in his possession. The defendant assurance company is one of those organized under the provisions of the statutes of 1891 (p. 106) and, following the life history of most of the companies of its kind, became as is alleged, insolvent, its only assets being the five-thousand-dollar trust fund in the hands of the treasurer.

J. H. T. Watkinson filed his complaint in intervention, alleging that he was the owner and holder of a certain debenture issued to him by the company. He alleged the failure of the life assurance company to comply with the conditions of its contract as evidenced by the debenture, further averred the assurance company was insolvent and had no surplus to be apportioned, that its only asset was the

trust fund of five thousand dollars in the possession of the state treasurer, and that he was entitled to resort to this fund for the payment of his demand. He in turn sought judgment for the amount due him under his debenture, and prayed that a receiver be appointed to take possession of the fund in the hands of the state treasurer and to dispose of it under the directions of the court. The court found in accordance with the allegations of plaintiff's complaint and of the complaint in intervention, adjudged plaintiff to be entitled to the sum of two hundred and thirty-six dollars, and the intervener to be entitled to the sum of eight hundred and forty-eight dollars, decreed that these sums be first and preferred charges against the trust fund of five thousand dollars held by the treasurer, appointed a receiver, directed the treasurer to pay the five thousand dollars to the receiver and directed that the receiver, after receiving the fund, give due and proper notice requiring all persons having or claiming any interest in the fund to be and appear herein within sixty days and show what right, title, or interest they or each of them have or claim to have in and to said fund. From this judgment the treasurer of the state appeals.

The rights of the intervener may, with advantage, first be considered and disposed of. The law of 1891, under which this corporation was organized, received detailed consideration at the hands of this court in *San Francisco Savings Union v. Long*, 123 Cal. 107, [55 Pac. 708]. So far as concerns the right of this intervener, the following extracts from that law are pertinent:

"Sec. 1. Every contract whereby a benefit may accrue to a party or parties therein named upon the death or physical disability of a person insured thereunder, or for the payment of any sums of money dependent in any degree upon the collection of assessments or dues from persons holding similar contracts, shall be deemed a contract of mutual insurance upon the assessment plan. Such contracts must show that the liabilities of the insured thereunder are not limited to fixed premiums.

"Sec. 2. Corporations may be formed . . . to carry on the business of mutual insurance upon the assessment plan. . . . No such corporation shall issue contracts of insurance until at least 200 persons . . . have paid to the treasurer . . .

the sum of \$5,000. This sum shall be invested in bonds or securities . . . Said bonds or securities . . . shall be placed . . . with the state treasurer, and the principal sum shall be held in trust for the contract holders of such corporation. . . .”

Section 1 above quoted contemplates a scheme of insurance against accident, disability, or death, whereby the insured shall pay no fixed annual premium, but shall be liable in the proportion which his insurance bears to the insurance of his fellows holding like insurance. Hence the provision that these contracts of insurance must show that the liabilities of the insured are not limited to fixed premiums, but will be as much or as little as may be necessary to make good the insurer's outlay whenever the insurer is called upon to pay a claim. The provision of section 2 that the five-thousand-dollar fund deposited with the state treasurer shall be held in trust for the contract holders of such corporation, means, first, that when the contingency arises whereby resort may equitably be had to this fund, all contract holders will be entitled to share ratably in it, and, second, that “contract holders” within the meaning of the section are not the general creditors of the company, though the company's debts to them may be evidenced by contract, but are the holders of insurance contracts issued by the company within the scope of its authority under this law.

The first and determinative question to be answered as to this intervener is whether or not he is such a contract holder. The reading of his contract compels an answer in the negative. The debenture, which is his contract with the company and upon which he bases his right to share in the fund as a contract holder, provided that the assurance company promised to pay at its office eight hundred dollars two years after date, with interest at the rate of six per cent per annum. This in its essence was the contract. True, the contract was confused, clouded, and befogged by other provisions usually found in the contracts of companies such as this, but none the less, stripped of these obscuring veils, such, and such only, was the contract. To illustrate, the debenture provided that the purchaser (called the subscriber), should at the maturity of the obligation be entitled, besides principal and

interest, to a surplus then to be apportioned. But it is impossible that there could be a surplus in any true sense to an assurance corporation operating upon the mutual assessment plan. Attached to this so-called debenture are two interest coupons, reciting that the assurance company will pay the beneficiary under this debenture forty-eight dollars (the amount of the annual interest) at its office, subject to the provisions of the contract. Hereby, as well as by the title "debenture", there is an attempt to clothe the transaction with something of the characteristics of a bond. Yet, as a bond, it lacks the essentials of carrying a lien or mortgage upon any of the property of the promisor. Numerous other provisions are supposed to be added to this contract by reference. Thus, it is declared that "the privilege and provisions placed by the company on the next page and in the interest coupons hereto attached, are conditions precedent to and are part of this contract as fully as if they were recited at length over the seal and signature hereto affixed." A consideration of these provisions and conditions demonstrate that, touching this contract, they are but for purposes of confusion only. There is, for example, a non-forfeiture clause. But there can be no possible forfeiture against a man who has fulfilled every obligation in his contract by lending to another a given amount of money payable with interest at a specified time. There is a provision also for reinstatement which declares that after this debenture has been in force one year it may be reinstated within six months after first default in the payment of any installment. But there were no installments to be paid. There could be no default, and this clause also serves but to "darken counsel by words without wisdom." Again, in the "subscription" which is made a part of this contract it is provided that the debenture subscribed for is to be issued on the mutual plan of participation in profits *and the installment payments are not limited to fixed premiums*. Here is an attempt to comply with, and, in the same sentence, to evade the provision of section 1 of the act of 1891, to the effect that such contracts must show that the liabilities of the insured thereunder are not limited to fixed premiums. In the first place, the holder of such a debenture is not an insured at all, and, in the second place, having simply loaned his money to the company, he

is not liable for any premiums whatsoever, whether fixed or to be determined by assessment. Only in the last clause at the end of this contract is there the slightest reference to insurance, and that is found in the following sentence: "At maturity, if the subscriber be then living and if the proceeds of the debenture are not withdrawn in cash, the entire value of the debenture and surplus may be converted into an annuity for life or may (subject to a satisfactory certificate of good health) be converted into a paid-up policy of life insurance." But this may not, by the most liberal construction, be distorted into a life insurance policy. It is merely an option extended to the owner of the debenture to take a policy in lieu of the money if he shall so desire. It follows herefrom that the intervener has no claim upon the fund until the claims of all the contract holders have been satisfied.

Coming now to the complaint of plaintiff, it will be remembered that the appointment of a receiver is not sought, the prayer of the complaint being merely that the amount found due to plaintiff be declared a lien upon and payable out of the five-thousand-dollar fund, and that Truman Reeves, as treasurer of the state, be ordered to pay the judgment out of such fund. This form of action draws support from the case of *Kruger v. Life and Annuity Association*, 106 Cal. 98, [39 Pac. 213]. But the views expressed in that case are irreconcilable conflict with those set forth in the later case of *Savings Union v. Long*, 123 Cal. 107, [55 Pac. 708]. It is there held, in brief, that the five-thousand-dollar fund is a trust fund to be ratably distributed amongst all the claimants entitled to share in it. Such a distribution cannot be had except in an action in the nature of a creditor's bill, upon the hearing of which, and with all the parties interested in the fund before it, the court may make equitable distribution of the fund and appoint a receiver to carry that distribution into effect. The method adopted by the court in this instance, of appointing a receiver with the command to all persons claiming any interest in the fund to appear and show cause within sixty days, is not a permissible substitute for the procedure prescribed in *Savings Union v. Long*. No doubt may be entertained of the right of the plaintiff under these circumstances to invoke the aid of equity in enforcing his demand,

but it will be a simple matter for the court, with the corporation defendant and its books before it, to cause a determination to be made of any and all other persons entitled to share in the trust fund, and invite or compel their presence and participation by interpleader in the action.

For which reasons the judgment and order appealed from are reversed and the cause remanded for further proceedings in conformity with the foregoing views.

[S. F. No. 4433. Department Two.—March 9, 1908.]

JOHN E. BOLLINGER, Respondent, v. GEORGE Y. BOLLINGER, Appellant.

MOTION FOR NEW TRIAL—SETTLEMENT OF BILL OF EXCEPTIONS—FAILURE TO PRESENT IN TIME—WAIVER OF OBJECTION.—Where, after notice of the settlement of a bill of exceptions on motion for new trial before the judge the opposing counsel appeared, and the counsel for the moving party, through inadvertence failed to be present at the time appointed, and was informed that the judge had suggested that the parties endeavor to settle the bill between themselves, to which the opposing counsel made no objection, and agreed for a meeting for settlement, at which he first objected that the bill was not presented in time, and urged such objection at the hearing, his subsequent objection came too late, and was waived.

ID.—MOTION TO DISMISS—ACTION OF COURT IN DENYING MOTION FOR NEW TRIAL—EXCULPATION FROM NEGLIGENCE.—Where, at the hearing of the motion for a new trial, the opposing counsel moved to dismiss the motion for failure to present the bill of exceptions in time, and the order of the court at the hearing, merely denied the motion for a new trial, its order in effect exculpated the counsel for the moving party from the charge of negligence.

ID.—APPEAL FROM ORDER DENYING MOTION—PRELIMINARY OBJECTION TO HEARING.—A preliminary objection to the hearing of the appeal, from the order denying the new trial, that the bill of exceptions was not presented in time, is without merit.

ACTION FOR MONEY BY ASSIGNEE—COMPROMISE OF CROSS-COMPLAINT BETWEEN PARTIES TO ANOTHER SUIT—CONFLICT—VOLUNTARY DISMISSAL—ERROR IN EXCLUDING DEPOSITION.—In an action by an assignee to recover money alleged to be due to his assignor for money agreed to be paid for compromise of a cross-complaint in another suit, upon dismissal thereof, where the evidence is

sharply conflicting as to whether such compromise was made, or the cross-complaint was voluntarily dismissed without promise, it was prejudicial error to exclude an admissible deposition, proving an admission by plaintiff's assignor that he dismissed the suit, because he wanted to, and was glad of it, and never received a cent nor the promise of a cent for it.

ID.—TAKING OF DEPOSITION—JURISDICTIONAL STEPS COMPLIED WITH—CLERICAL MISPRISION IN FORM OF NOTICE—OBJECTION—WAIVER BY CROSS-EXAMINATION.—Where the proper jurisdictional steps to the taking of the deposition were complied with, and the proper affidavit, required by section 2031 of the Code of Civil Procedure had been made; but in service of the notice and papers, there was a clerical misprision in omitting the name of the officer before whom the affidavit was made, objection thereto was waived by attendance of the opposing counsel at the taking of the deposition, and taking part in the cross-examination of the witness, notwithstanding a previous preliminary objection to the examination of the witness, on the ground of defect in the notice.

ID.—RULE OF COMMON LAW AS TO STRICT PURSUANCE OF STATUTES ABROGATED IN THIS STATE.—The rule of the common law that statutes for the taking of depositions in derogation thereof are to be strictly pursued, has no force in this state, by virtue of section 4 of the Code of Civil Procedure.

ID.—OBJECT OF NOTICE—WAIVER—ESTOPPEL.—Even in jurisdictions where the common law applies, the rule is enforced that the object of notice of the taking of a deposition, where other prerequisites of the statute are complied with, is to secure the opportunity of cross-examination, and that if the opposite party appears and cross-examines the witness, this is a waiver of all defects in the notice, or of the fact that no notice has been served; and he ought not to be heard in such case to say that he had no notice.

APPEAL from an order of the Superior Court of Santa Clara County denying a new trial. A. L. Rhodes, Judge.

The facts are stated in the opinion of the court.

Charles W. Slack, V. A. Scheller, and Adolph Loessel, for Appellant.

William P. Veuve, and William A. Bowden, for Respondent.

McFARLAND, J.—This is an appeal from the order of the court denying defendant's motion for a new trial. To the hearing upon the merits respondent interposes the preliminary objection that plaintiff's bill of exceptions was not pre-

sented in time. The facts in this regard are the following: Defendant's attorneys had presented their proposed bill of exceptions, and plaintiff's attorneys had presented their proposed amendments thereto in due season. Defendant's attorneys gave notice of the rejection of all of the proposed amendments and named the day and hour at which they would present to the judge for settlement the proposed bill of exceptions and the proposed amendments thereto. One of the plaintiff's attorneys was present at the hour named, but neither of defendant's attorneys appeared. About an hour elapsed, when the judge inquired of the plaintiff's attorney whether the attorneys for the respective parties had conferred in order to dispose of the objections to the proposed amendments as far as possible, and was answered that they had not. The judge then requested that the attorneys of the respective parties meet and settle the bill of exceptions so far as possible and thereafter present the same to the judge. The judge understood the attorney for plaintiff as assenting to that request, but not as waiving any objection to the settlement of the bill. Defendant's attorney, Mr. Scheller, who had charge of the settlement of the bill, was busily engaged, and through inadvertence forgot the matter until two o'clock of the same day, when he went immediately to the courtroom and was informed by the clerk of the court that court was adjourned for the day. He was told also of the request which the judge had made to plaintiff's attorneys, and that plaintiff's attorney, Mr. Veuve, had made no objection thereto. On the same day Mr. Scheller saw Mr. Veuve and asked him when they could take up the settlement of the bill. Mr. Veuve answered that he could not state what could be done in that matter until he had consulted with Mr. Bowden, his associate attorney in the action. Mr. Scheller, relying upon that answer, did not give further notice that the bill and objections to it would be presented to the judge for settlement. Subsequent to this, the attorneys did meet, and disposed of most of the objections to the settlement of the bill without the intervention of the judge, though at this meeting Mr. Veuve objected to the settlement of the bill upon the ground that it had not been presented to the judge or left with the clerk for settlement within the time prescribed by law, Mr. Scheller always contending that such objection had

been waived. The judge stated that he regarded it as his duty under the circumstances to settle the bill and did so. At the hearing of the motion for new trial plaintiff's attorney formally objected and moved to dismiss the motion upon the ground above stated. The order of the court in the matter is as follows: "Thereupon said motion is presented to the court and submitted for consideration and decision, and the court being fully informed in the premises now orders that said motion be and the same is hereby denied." This order in legal effect, exculpates the defendant from the consequences of his negligence, whatever that negligence may have consisted of. In fact the negligence itself was of the slightest character. He appeared in court, though tardily, upon the day set in his notice. He was informed of the arrangement which the judge had suggested, that the attorneys should confer, and of the fact that plaintiff's attorney made no objection thereto. He interviewed plaintiff's attorney upon the same day, to fix the time for their conference, and was not then advised that any objection would be made to the settlement, but merely that Mr. Veuve would have to consult with his associate before naming a day. It will be remembered that Mr. Veuve voiced no formal objection before the judge, nor yet to Mr. Scheller, at the time of their interview. His subsequent objection came too late. In *Hicks v. Masten*, 101 Cal. 651, [36 Pac. 130], under a similar state of facts this court said: "The time at which the want of notice should have been urged was when the court fixed the time for the settlement and requested him to be present; and his failure to object then, and his assent, implied in the statement that he would be on hand, should have been held a waiver of any other or different notice. Objections of this character should be made at the earliest opportunity, or, at least, when the party is first required to speak in relation to it." It is therefore held that respondent's preliminary objection to the hearing of this appeal is without merit.

The single proposition presented upon the appeal is, Did the court in excluding a certain deposition commit error harmful to appellant's rights? To the better understanding of the court's ruling and of its consequences, the following facts are pertinent. George Y. Bollinger, defendant herein, and David A. Bollinger (plaintiff's father and assignor) were,

with others, defendants in an action pending in the superior court of the county of Santa Clara. David had filed an answer and cross-complaint against his co-defendant George. Subsequently he dismissed his cross-complaint. In this action a recovery against George for ten thousand dollars is sought upon the ground that the cross-complaint was dismissed pursuant to an oral agreement between David and George made by way of compromise, to the effect that George would pay ten thousand dollars for dismissal. The evidence upon the trial was sharply conflicting. David and his son John, plaintiff herein, testify to a conversation at which they and the defendant George alone were present, at which the agreement was made. This is squarely denied by George. It was shown on cross-examination of David that while he was contending that George owed him this ten thousand dollars he borrowed from him five hundred and seventy-two dollars, and gave him his promissory note therefor. David could not explain and did not know why he had given the promissory note. There was some testimony to the effect that David had on several occasions asked George for the ten thousand dollars. This again is positively denied by George. George in turn testified that after the dismissal of the cross-complaint a conversation took place at his home at which there were present, David, himself, Hattie E. Bollinger, his wife, and Marian Allen, his wife's mother. George testifies that upon this occasion David said, in the presence and hearing of all, that he had been accused of being bought off for dismissing the case, and that the fact was that he had never got a cent nor ever got the promise of a cent. George's testimony to this effect is corroborated by his wife, and, in turn, is positively denied by David.

So much has been stated to show how sharply conflicting was the evidence and how diametrically opposed were the statements of the interested witnesses. The case presented is one where corroborative or cumulative testimony upon any of the disputed matters must have proved of great value. The testimony of Mrs. Allen in the rejected deposition was that David said to her upon the occasion above referred to, "By the way, I have seen the Pullans. They accuse me of receiving money or going to get money to dismiss the suit. I never have received a cent nor the promise of a cent. I dismissed

the suit because I wanted to and I am glad of it." This testimony, if true, amounts to an admission by David that he had no contract or agreement with George, and thus drags down the very foundation of the cause of action here pleaded. If true, the cause of action must fail, saving upon the one theory that in the making of this admission David deliberately lied, and, if so, this circumstance itself is important as affecting the credibility to be given to his testimony. But we need not prolong this consideration. It is all-apparent that the rejected evidence was material and important.

The deposition was taken by virtue of the provisions of sections 2021, subdivision 3, and 2031, 2032, Code of Civil Procedure. The affidavit required by section 2031 had been made. In the copy of the papers served on the plaintiff, the affidavit was set forth and was defective only in this, that the name of no notary or other officer authorized to administer oaths appeared thereon. It did so appear upon the original, and, indisputably, the omission in the copy was but a clerical misprision. Plaintiff's counsel attended at the taking of the deposition, and, after objecting, remained and cross-examined the witness. In behalf of the ruling of the trial court in suppressing the deposition, respondent invokes the rule that the statutes authorizing the taking of depositions are in derogation of the common law, and must be strictly pursued, and that such irregularity as above indicated warrants, if it does not command, the exclusion of the document.

But whatever force may be attached to this proposition in forums where the rules of common law are strictly pursued, it has no force in this state, by virtue of section 4 of the Code of Civil Procedure, which distinctly declares that the rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the Code, and that its and all proceedings under it are to be liberally construed with a view to effect its objects and to promote justice. Even in the federal courts, where the common law furnishes the rules for procedure, and where, as in this state, there is no statute ameliorating its sometimes harsh provisions, it is said, in a case like this: "Being in derogation of the rules of the common law, the formalities prescribed by the act must be observed; and many cases can be found in which such depositions have been rejected, because it did not

appear that the required conditions or formalities had been observed. They are all, however, cases in which the party objecting did not attend the cross-examination of the witness, or took no part in it." (*Shutte v. Thompson*, 15 Wall. 151.) Indeed, it may be set down as the universal rule that where the jurisdictional steps prescribed by the statute for the taking of the deposition have been complied with, and the defect is an irregularity in the form of notice, such a defect is waived and cured by the appearance of the opposing counsel at, and the participation in, the taking of the deposition. Of course, the rule is to the contrary if the error be substantive, going to a failure to comply with any of the prerequisites in obtaining the order for the taking of the deposition. Says 1 Greenleaf on Evidence (16th ed., sec. 163b), "The whole object of the notice being the opportunity to cross-examine, the deposition is receivable if there was actually a cross-examination or an attendance for it, even though the notice was formally defective." And says Jones (3 Jones on Ev., sec. 689): "It is a familiar rule that defects in the notice or in other steps incident to the taking of the deposition may be waived, either by the acts of the parties or by express stipulations. Thus, if a party or his attorney appears and cross-examines a witness, this is a waiver of all defects in the notice or of the fact that no notice has been served. This rule rests upon the ground that, when a person avails himself of the privilege which a notice is designed to give, he ought not to be heard to say that he has had no notice." (See, also, *Miller v. McDonald*, 13 Wis. 673; *Erwin v. Bailey*, 123 N. C. 628, [31 S. E. 844]; *Long v. Straus*, 124 Ind. 84, [24 N. E. 664]; *Ryan v. People*, 21 Colo. 119, [40 Pac. 775]; *Wallingford v. Western Union Tel. Co.*, 60 S. C. 201, [38 S. E. 443, 629]; *Osgood v. Sutherland*, 36 Minn. 243, [31 N. W. 211]; *Hunt v. Crane*, 33 Miss. 669, [69 Am. Dec. 381]; *Goodfellow v. Landis*, 36 Mo. 168; *Kelly v. Ning Yung Benevolent Assoc.*, 2 Cal. App. 460, [84 Pac. 321].)

For these reasons the judgment and order appealed from are reversed and the cause remanded.

Henshaw, J., and Angellotti, J., concurred.

[Sac. No. 1581. In Bank.—March 11, 1908.]

CONGREGATIONAL CHURCH BUILDING SOCIETY,
Respondent, v. E. B. OSBORN et al., Appellants.

RELIGIOUS CORPORATIONS—AID TO CHURCH BY BUILDING SOCIETY—MORTGAGE CONDITIONS SECURING APPLICATION OF MONEY—STATUTE OF LIMITATIONS.—Where a Congregational church building society advanced money to aid in the erection of a Congregational church, secured by mortgage, under an instrument the main purpose of which was to secure the application of the money to compel the continuous use of the property as a Congregational house of worship and to prevent a different use, and which contained specific and general conditions for the performance of the duties of the church, upon breach of which, the money secured was to be immediately due and payable, without notice or demand, and the property sold to pay the same, the statute of limitations does not begin to run against the will of the building society for breach of specific conditions known to exist more than four years before suit, which it must overlook and waive by acquiescence; and upon foreclosure of the mortgage for alleged breach of all the conditions, which is admitted by the answer, it is to be presumed that the cause of action is not barred by the statute of limitations.

ID.—PRESUMPTION AS TO CONTINUED USE OF HOUSE OF WORSHIP.—It is to be presumed that public worship was maintained, and the general functions and work of the church performed until a time within the period of limitation. These conditions constitute the principal matters intended to be secured, and the principal inducement for the money paid in aid of the church.

APPEAL from a judgment of the Superior Court of Stanislaus County. L. W. Fulkerth, Judge.

The facts are stated in the opinion of the court.

P. H. Griffin, for Appellants.

The cause of action accrues when the plaintiff had a right of action for breach of the conditions and was clearly barred by the statute of limitations of four years after such breach. (Code Civ. Proc., secs. 337, 343; Civ. Code, sec. 2911; *Bissel v. Forbes*, 1 Cal. App. 606, 82 Pac. 698.)

Dennett & Walthall, for Respondent.

Stipulations as to an earlier maturity on failure to pay taxes, insurance, etc., do not shorten the statute of limitations. (20 Am. & Eng. Ency. of Law, p. 932, and cases cited; *Belloc v. Davis*, 38 Cal. 249; *Richards v. Daley*, 116 Cal. 336, 46 Pac. 220.) Mortgages like this are recognized as containing just and equitable provision for the protection of funds in aid of the church. (*Board of Church Erection etc. v. First Presbyterian Church*, 19 Wash. 455, 53 Pac. 671.) The statute does not run upon a continuing contract. (*McCay v. McDowell*, 80 Iowa, 146, 45 N. W. 730; *Lane v. Wingate*, 25 N. C. 326; *Jackson v. Mull*, 6 Wyo. 55, 42 Pac. 603; *Louisville R. Co. v. Pitman*, 21 (Ky.) Law Rep. 1027, 53 S. W. 1040.)

SHAW, J.—This is an action to foreclose certain liens created by two instruments in writing, executed by the First Congregational Church Society of Turlock, covering the land on which its house of worship is situated. Plaintiff had judgment and the defendants appeal.

The first instrument was executed on October 18, 1889, to the American Congregational Union, a corporation, which has since merged into and become the Congregational Church Building Society. The second was executed to the plaintiff corporation by name on February 5, 1896. The two instruments are alike in form in other respects. The sole question presented is whether or not the action is barred by the four years' statute of limitation. For convenience we will consider only the instrument of February 5, 1896.

The instrument in question is very peculiar in character, and, so far as we have been able to ascertain, such instruments have never been the subject of judicial construction. From its terms it may be inferred that the plaintiff is, as its name indicates, a society organized and carried on for the purpose of receiving and applying contributions to aid in the erection of houses of worship for use by Congregational churches. In order to present the case properly it will be necessary to state somewhat fully the contents of the instrument. It recites that, upon the application of the Turlock Congregational Church Society, the Building Society had provided aid to the amount of \$432.75 to enable the Turlock Society to erect and pay for a house of worship. The Turlock Society then covenants, in consideration of said sum of money,

that it would use the money only for the purposes aforesaid, that it would continue to be an Evangelical Congregational church and to maintain public worship, that it would make an annual contribution to the Building Society, would preserve its corporate existence, would not alienate said house of worship or any portion of the premises described, would pay all taxes and liens thereon, and would keep the house insured.

It then declares that "for the better securing of said sum of money and the performance of its covenants and obligations herein contained and the repayment of the said amount" to the Building Society "as herein provided," the Turlock Society thereby granted to the Building Society a tract of land in Turlock fifty-eight by one hundred feet in extent and particularly described. Then follows a proviso to the effect that, so long as the Turlock Society should keep and perform the covenants and obligations in the instrument contained, "it may and shall remain in possession and enjoyment of said premises for the uses and purposes of the Evangelical Congregational church as fully and freely as if these presents had not been executed," and that "on payment of said sum" to the Building Society, and on performance of all the covenants of the instrument, the estate thereby granted should cease, determine, and be void.

Another clause contained the proviso that the Turlock Society "doth hereby covenant and agree to and with" the Building Society, that if the Turlock Society "or the church in connection with which it is organized" should cease to be an Evangelical Congregational church, or should for one year suspend public worship, or should cease to exist in its corporate capacity, or alienate its house of worship, "or fail to keep or perform any of the covenants or agreements hereinbefore provided, then in that case the whole amount secured by these presents shall be and become immediately due and payable and shall be paid by" the Turlock Society to the Building Society "without further notice or demand," and that in default of such payment, the Building Society should have the right to enter upon the granted premises "and to sell and dispose of the same" at public auction and convey the same in fee simple to the purchaser, and after retaining out of the proceeds the costs of sale and the amount secured, render the surplus to the Turlock Society.

This is not an ordinary mortgage to secure the payment of a debt. It was not the intention or purpose of the parties that a debt should exist from the church to the Building Society, except in the contingency that the primary objects of the transaction should fail. The money was not advanced or delivered to the Turlock Society as a loan. It was "provided" as "aid" toward the erection of a church, to the end that a local church society of the Congregational faith should be maintained in Turlock, and so long as such society was properly carried on there was to be no disturbance of its possession and no obligation on its part to repay in money. It was, no doubt, the anticipation and desire of both parties that the local church society should perpetually continue to exist and conduct the church affairs in the manner specified in the covenants. It is to be presumed that this was the purpose for which the local church was organized, and that it was a part of its duty independent of the obligations contained in the covenants. If it did so, the purpose of the plaintiff's donation would be accomplished and no debt would ever arise. The main purpose of the instrument was not to secure the repayment of the money, but to secure the application of that money to the purposes for which it was donated, to compel the continuous use of the property into which it was converted as a Congregational house of worship, and to prevent its being devoted to different uses.

The finding of the court is that the Turlock Society had not made an annual contribution to the Building Society for more than seven years before the action was begun, that it had not paid the taxes nor kept the building insured since the year 1894, and that the plaintiff knew of these failures more than six years before the action was begun. The complaint was filed on July 16, 1904. It is not found that any other breaches of the covenants had occurred. There is a finding that a meeting of the society had not been held since February, 1896. There is no covenant requiring that any meetings of the society shall be held. The covenant is for the holding of public worship, which is a different thing from a meeting of the society. The complaint alleges in general terms that all the conditions of the mortgage have been broken, and this allegation is admitted in the answer. This, however, does not establish the fact that they were broken more than

four years before the action was begun. Hence, the breaches mentioned in the findings, as above stated, are the only ones which occurred more than four years before the action was begun, and those only are to be considered in determining whether or not the action is barred. It is to be presumed that public worship was maintained and the general functions and work of the church performed until a time within the period of limitation. These latter constitute the principal matters intended to be secured and the principal inducement for the donation in question. The covenant to make an annual contribution could have been fulfilled by the contribution of any sum, however trifling. This, with the covenant to pay taxes and insurance, was of comparatively minor importance.

The contention of the appellants is that the agreement of the Turlock Society to repay the money to the Building Society became a matured obligation for money due, forthwith upon the occurrence of a breach of any of the covenants of the agreement, that a cause of action to foreclose the lien then at once accrued in favor of the Building Society, against which cause of action the statute of limitations began to run simultaneously with the breach of the covenant, and that this result would follow without the concurrence of any affirmative act of the Building Society, and even against its wish and will.

We do not think this rule is applicable to the instrument in question. It is not to be viewed as an ordinary commercial transaction. The cases, of which there are many, holding that where the time of payment of a debt is made to depend upon the happening of a given event, the debt becomes due immediately upon the occurrence of the event, are not fully applicable to transactions of this character. It is true that upon the happening of the event the plaintiff could at once proceed to sell the property under the power of sale contained in the instrument, or foreclose the lien, and that this could be done without notice or demand, other than the notice of sale, in one case, and the beginning of the action, in the other. But it does not follow that this would be the result of a breach independent of, or against, the will of the Building Society. We think the rule adopted after full consideration in the case of *Belloc v. Davis*, 38 Cal. 249, is applicable to the case at bar. That case involved an ordinary commercial transaction, a mortgage and note for the payment

of a debt owing to the mortgagee. The note provided that on failure to pay the monthly interest when due, the principal and interest should "become due and payable, immediately, upon such default." Nothing was said about notice or demand and neither was required to make the interest due. By the terms of the note it became due at certain stated times. Discussing the question of the effect of the failure to pay the interest upon the running of the statute of limitations, the court said: "The provision in the note, to the effect that in the case of a default in the payment of interest, the whole amount of principal and interest shall 'become due and payable immediately upon such default,' is evidently in the nature of a penalty, inserted for the benefit of the creditor, and as an incentive to the debtor to stimulate him to the prompt payment of the interest in order to avoid a forfeiture of the credit allowed by the note. Being in the nature of a penalty, inserted for the sole advantage of the creditor, it was competent for him to waive the benefits which it secured to him, as the plaintiff in this case has done, by accepting payment of the interest after default made." And, in illustration of the necessity for this rule and the results of a contrary doctrine, the court further said: "Suppose the case of a promissory note payable ten years after date, with interest payable monthly, and with a clause that the principal is to become due on a failure to pay the interest, as in this case. The interest for the first month is not paid precisely on the day it became due, but is paid and accepted on the following day, and thereafter, for three years, is paid punctually at maturity every month; and whilst being so paid, and without any new default, the creditor brings his action to collect the principal sum, on the ground that the credit had been forfeited by a failure to pay the first month's interest for a single day, three years before. To hold that the action could be maintained, under these circumstances, would be repugnant to every principle of reason and justice, and shock the common sense of mankind. But if the argument for the defendants be sound, the creditor could not only maintain the action in the case supposed, but would be obliged to institute it within four years from the time of the default, on pain of losing his entire debt by the bar of the statute of limitations. We deem this to be altogether a too narrow and technical con-

struction of the statute, which, though designed to be a statute of repose, was never intended to work such hardship as this." The decision then proceeds to refer to the analogy of clauses in a lease declaring the lease forfeited upon failure to pay rent, in which case, as is well known, the landlord may waive or enforce the forfeiture at his option, and that if he so elects the lease will continue, notwithstanding the fact that by the strict terms of the covenants it would have ceased to exist by reason of the breach. Upon this point it said that the tenant would not "be allowed to say that he is discharged from his covenants by his own default in the payment of rent. In other words he is estopped from alleging a forfeiture caused by his own default, on the familiar principle that a party shall not take advantage of his own wrong." This case has been approved in the subsequent decisions of this court. (*California S. and L. Society v. Culver*, 127 Cal. 107, [59 Pac. 292]; *Moore v. Russell*, 133 Cal. 300, [85 Am. St. Rep. 166, 65 Pac. 624]; *Mason v. Luce*, 116 Cal. 236, [48 Pac. 72].) In the two cases first cited it is held that the holder of the note containing such a clause may, even after he has exercised his option, elect to waive the forfeiture and thereby avoid the effect of his first election and restore the instrument to its *status* as an unmaturing obligation.

The only point in which *Belloc v. Davis* differs from the case at bar is that in that case the obligation would become due in any event after a fixed period, whereas in this case it was not the intention that it should ever become due. This difference is not important to the application of the reasoning of that case to this case. Indeed, it may be said that it makes the reasoning more forcible in this case than in that. The rule is universal, with the exceptions provided in the statute itself, and certain cases where the statute is suspended when it becomes impossible under the law for a plaintiff to begin his action, that when the period of limitation has once begun to run, it cannot be postponed, suspended, or interrupted by any subsequent condition. (19 Am. & Eng. Ency. of Law, pp. 212, 215, 224; Wood on Limitations, sec. 6.) If the slightest breach of these covenants would set the statute irrevocably in motion, it would follow that if the tax became delinquent for a month, or a policy of insurance lapsed a few days before renewal, the plaintiff being aware thereof,

the money given as a donation would at once be changed to a matured debt, and the Building Society would be compelled to enforce payment within the succeeding four years, on pain of losing its money and of being deprived of all power to enforce the main objects in furtherance of which the money was provided, although, in the mean time, the delinquent tax had been paid, the building kept fully insured, and the primary object of maintaining public worship in the Congregational faith had been continually and satisfactorily accomplished. As in the case of a note payable at a future period, but providing for the forfeiture of credit upon failure to pay an intermediate installment of principal or interest, so here, the plaintiff has the right to waive the forfeiture provided by the instrument for its benefit, and to allow the Turlock Society to continue to perform such of the covenants as it was able to perform, without setting in motion the statute of limitations in its favor. The provision for the money to become immediately due, being for the benefit of the Building Society, it had the right to indulge the other party and prevent the forfeiture. The waiver mentioned in *Belloc v. Davis* was evidenced by the subsequent receipt of the defaulted interest. That, however, is not the only method by which a waiver can be made or evidenced. It could be accomplished by mere passive acquiescence, as in the present case. (29 Am. & Eng. Ency. of Law, p. 1105.)

The judgment is affirmed.

Angellotti, J., Sloss, J., Henshaw, J., and Lorigan, J., concurred.

[S. F. No. 4083. In Bank.—March 11, 1908.]

PETER OLSEN NELSON, Respondent, v. MARY E. NELSON, Appellant.

APPEAL—DISMISSAL AFTER SETTLEMENT OF CONTROVERSY—COSTS ON APPEAL.—An appeal will be dismissed, if during its pendency all matters in dispute in the action are settled by agreement between the parties. The appellate court will not, after such settlement of the controversy, retain and decide the questions involved on the appeal solely for the purpose of incidentally determining who shall pay the costs on appeal.

APPEAL from a judgment of the Superior Court of Santa Clara County and from an order refusing a new trial. A. L. Rhodes, Judge.

The facts are stated in the opinion of the court.

J. R. Webb, and C. D. Wright, for Appellant.

William H. Johnson, for Respondent.

THE COURT.—This was an action to obtain a decree setting aside a conveyance of real property and a bill of sale of personal property executed by plaintiff to defendant. Plaintiff had judgment as to the conveyance of real property, and defendant appealed from such judgment and from an order denying her motion for a new trial. Upon the calling of the case upon the calendar for oral argument, it was made to appear to the court that since the judgment the parties have settled between themselves all the matters in dispute in said action. It follows that the appeal, being no longer a contest involving the determination of adversary rights, must be dismissed, unless, as suggested, we are required to retain and decide the questions presented upon the appeal solely for the purpose of incidentally determining who shall pay the costs on appeal. It is settled to the contrary in this state. In the *Estate of Blythe*, 108 Cal. 124, [41 Pac. 33], it was held that an appeal from a decree of distribution taken by Alice Edith Blythe pending a previous appeal by her from an order denying a new trial in a proceeding to determine heirship, must be dismissed upon the affirmance of the order denying a new trial, such affirmance being a final determination that she had no right in the estate, and no interest in the matter of distribution. The court said: "Appellant contends that her right to costs following a successful appeal, even if her right is found to be no greater than this, gives her such a substantial interest in the controversy as must compel the retention and determination of the questions presented by her appeal. But to this we cannot accede. Were appellant, for example, to declare that she had surrendered her claim to respondent, and finally adjusted and disposed of the matter in controversy, saving that it had been agreed be-

tween them that the appeal should be pressed to a decision, solely to determine which of the two should bear the costs, it would present a case not different in principle from the present, and, the costs being incidental to the judgment, the appeal would be dismissed as no longer being a contest involving the determination of adversary rights."

The appeal is dismissed.

[Sac. No. 1503. In Bank.—March 11, 1908.]

**VISALIA SAVINGS BANK et al., Respondents, v. CITY
OF VISALIA et al., Appellants.**

SCHOOL DISTRICT—LAND OUTSIDE OF CITY LIMITS—TAXATION—LEVY OF TAXES BY TRUSTEES OF CITY.—Under the Municipal Corporation Act (Stats. 1883, p. 24), and its amendments of 1891 and 1901, and sections 1576 and 1670 of the Political Code, the board of trustees of a city of the fifth class, the territory of which together with adjoining territory outside of its limits constitutes a school district, has power to levy a school tax upon the lands of the school district lying outside of the city. The exercise of such power by the board of trustees is not violative of any inhibition of the constitution.

APPEAL from a judgment of the Superior Court of Tulare County. W. B. Wallace, Judge.

The facts are stated in the opinion of the court.

H. B. McClure, and H. T. Miller, for Appellants.

Chas. G. Lamberson, and Frank Lamberson, for Respondents.

McFARLAND, J.—The defendant, the city of Visalia, is a municipal corporation of the fifth class, and the other defendant, T. W. Holder, is a tax-collector of said city. The plaintiffs are owners of lands and mortgage liens on lands which lie outside of but adjoining the corporate territory of said city. In 1905, the city trustees of the city of Visalia levied a school tax on these outside lands of plaintiffs, and this tax becoming delinquent, the defendant T. W. Holder advertised the lands

for sale, and was about to sell the same for said taxes, whereupon plaintiffs brought this action to obtain a judgment adjudicating said tax to be invalid and void and enjoining the said T. W. Holder from selling said lands under said tax. The defendants filed an answer setting up that during the times mentioned in the complaint there was a school district composed of the territory inside of said city, and other territory adjoining on the outside, which included the lands described in plaintiffs' complaint, and that the tax has been rightfully levied on said lands as part of said school district. To this answer plaintiffs filed a general demurrer, which was sustained, and defendants declining to amend, judgment was entered in favor of plaintiffs according to the prayer of the complaint. From this judgment defendants appeal.

There is no doubt that by the general law (Municipal Corporation Act, stats. 1883, p. 24, and amendments of 1891 and 1901; Pol. Code, secs. 1576, 1670) power was given to the trustees of the city to levy a school tax upon the lands of the school district lying outside of the city. The law provides for the creation of a school district composed partly of the lands in the city and partly of the lands on the outside adjoining it. In such cases the residents of the district outside of the city have a right to vote for the board of education, or school trustees, of the district; the board of education are to submit to the board of trustees of the city an estimate of the tax deemed necessary for school purposes. When the tax is collected the board of education has full control over its expenditure; and in no instance shall the tax be greater than twenty cents on every hundred dollars' worth of property. It may be observed, whether this consideration be of importance or not, that there is no room left here for that oppression which may be exercised by the body having either unlimited or very extensive powers of taxation. The power of taxation given the city board of trustees is valid, unless there is some constitutional objection to the exercise of that power to any extent. The fact that the board of trustees of the city is given power, at the request of the board of education, to levy a tax on lands outside of the city, may afford a plausible excuse for indulgence in some general chatty talk about constitutional principles; but this power given the board of trustees does not violate any existing inhibition of the constitution which has been pointed out to

us. In our opinion, therefore, this contested power is not unconstitutional, but is valid and effective.

We think that there is a sufficient averment in the answer of the existence of the Visalia school district, at least as against an attack by a general demurrer. Of course, upon a trial, the question whether the said school district has been regularly and legally adopted under the law, will be open for examination and decision.

The judgment appealed from is reversed and the case remanded with directions to the superior court to overrule the demurrer to the answer.

Angellotti, J., Shaw, J., Henshaw, J., Sloss, J., and Lorigan, J., concurred.

[S. F. No. 4561. Department Two.—March 12, 1908.]

GOTTLIEB SCHMIERER, Appellant, v. MUTUAL RESERVE FUND LIFE ASSOCIATION, Respondent.

LIFE INSURANCE—ASSESSMENT INSURANCE—PROVISION FOR INCREASE OF RATE OF PREMIUM.—A provision in a certificate of life insurance, issued by an assessment life insurance association, that the "rate of the mortuary premiums may be changed to correspond with the actual mortality experience of the association," is an unequivocal declaration of the reserved right of the company to increase its premiums as the exigencies of its business may require.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Wal. J. Tuska, for Appellant.

Van Ness & Redman, for Respondent.

THE COURT.—Respondent, an assessment life insurance association, issued in 1884 to one James D. Marvin a certificate of life insurance in the sum of five thousand dollars.

Marvin for several years was the agent of respondent in San Francisco. The certificate required the payment of annual dues of ten dollars and also bi-monthly assessments, the amount of which was dependent upon the mortality experience of the association. Marvin assigned his certificate to plaintiff and on April 5, 1889, a new certificate was issued in which plaintiff was payee. By the terms of this certificate it was provided that "within thirty days from the first week day of the months of February, April, June, August, October and December of each and every year during the continuance of this certificate or policy of insurance as there shall be payable to the Association a mortuary premium for such an amount as the executive committee of the Association may deem requisite, which amount shall be at such rate, according to the age of each member, as may be established by the Board of Directors, and the net amount received, as provided in the Constitution or By-Laws of said Association, less twenty-five per cent to be set apart for the Reserve Fund, shall go into the Death Fund to meet the current mortality of the Association." And it was further provided in said certificate that the "rate of the mortuary premiums may be changed to correspond with the actual mortality experience of the Association."

The assessments levied on the certificate were duly paid until June 30, 1903, when default was made in the payment of a bi-monthly assessment. The assessment was levied on May 31, 1903, and called for the payment of \$37.65 within thirty days thereafter. Plaintiff refused to pay this assessment and tendered the defendant the sum of \$11.86, which amount plaintiff refused to accept and thereafter declared the contract forfeited. Plaintiff then brought this action to recover the amounts which had been paid under the contract. He contends that \$11.86 is the maximum amount of the bi-monthly assessment which can be levied against him under the terms of his contract of insurance. The trial court held to the contrary and this appeal is taken. The determination of this question depends upon the construction to be given to the contract.

Appellant's position is that by the terms of this contract he was entitled to insurance for a fixed premium bi-monthly of \$11.86, notwithstanding the fact that at the time when

the insurance was issued and when Marvin was forty-two years of age the rate in an old-line, level premium insurance company would have been more than twice that amount, and that for the increase of the years no advance could be made in the premiums of an insurance company operating upon a mutual assessment plan notwithstanding the increased risk to the insurer.

If this contention expresses the true meaning of the contract, then it needs no argument to disclose that the insurance company itself was conducting its operations upon a most reckless basis and issuing contracts which could but end in its ruin.

We think, however, by a reading of the clauses above quoted, and others, which while pertinent to the question, are not necessary here to be set forth at length, since they are provisions designed to effectuate the payments of the rates to be fixed from time to time, that it is clear that the interpretation sought for by this appellant is not only in violation of every principle of assessment insurance, but is in direct conflict with the provisions of the certificate itself. The one declaration contained in the certificate that the "rate of the mortuary premiums may be changed to correspond with the actual mortality experience of the Association" is itself an unequivocal declaration of the reserved right of the company to increase its premiums as the exigencies of its business may require. This construction of the contract is in accord with that given to a like contract in the case of *Gaut v. Mutual Reserve Fund Life Assoc.*, 121 Fed. 403.

For these reasons the judgment and order appealed from are affirmed.

[Sac. No. 1589. In Bank.—March 12, 1908.]

COUNTY OF GLENN, Respondent, v. L. J. KLEMMER, as
Treasurer of the County of Glenn, and HOCHHEIMER
& COMPANY (a Corporation), Appellants.

COUNTIES—EXPENDITURE OF SEVENTY PER CENT OF FUND PRIOR TO
JANUARY FIRST—CONSTRUCTION OF COUNTY GOVERNMENT ACT.—
Under section 36 of the County Government Act of 1903 (Stats.
1903, p. 402), whenever, for any and all purposes, in any fiscal year,
seventy per cent of a particular county fund has been expended
prior to the first of January of that fiscal year, or liabilities to the
amount of seventy per cent have been incurred payable therefrom,
no more of the fund's money may be expended prior to January
first, except only for the emergency purposes enumerated in that
section.

APPEAL from a judgment of the Superior Court of Glenn
County. John F. Ellison, Judge.

The facts are stated in the opinion of the court.

R. L. Clifton, District Attorney, and Clifton & Zumwalt,
for Appellants.

Charles L. Donohoe, and Frank Freeman, for Respondent.

HENSHAW, J.—Section 36 of the County Government
Act of 1903 (Stats. 1903, p. 402) provides as follows:—

“Up to and including the first day of January in each
fiscal year the board shall have no power for any
purpose to contract debts or liabilities in any manner
or for any purpose nor to make any allowances against any
funds which, with all the debts and liabilities fixed by law
payable therefrom, shall exceed seventy per cent of the
auditor's estimate of the revenue for the year, except to
build or repair roads and bridges which have been destroyed
or made impassable by flood or fire. And debts and liabili-
ties contracted in any manner or for any purpose and
any allowances made contrary to the provisions of this sec-
tion shall be null and void and the auditor shall not draw
his warrant therefor nor the treasurer pay the same.”

The plaintiff in this action alleged that liabilities amounting to seventy per cent of the auditor's estimate of the funds of a certain road district had been incurred prior to January first of the fiscal year commencing July 1, 1904; notwithstanding this, that the supervisors had allowed claims against this fund accruing before January 1st, in excess of the seventy per cent and that these excess claims were not for expenses incurred in the emergency work of building or repairing roads or bridges destroyed or made impassable by flood or fire. Plaintiff further pleaded that the defendant Klemmer, as treasurer of the county, would, unless restrained pay these claims, and the action was brought to prevent him from so doing. Defendant Hochheimer & Co., assignee of the claims which had been allowed in excess of the seventy per cent, pleaded as an affirmative defense that forty per cent of the seventy per cent of claims which had been allowed were for emergency expenditures expressed in the law, and that therefore, within the contemplation of section 36 there was still thirty per cent of the auditor's estimate available for the payment of the ordinary expenses of the repair of the roads. Defendant also demurred to the complaint, its demurrer going to the same question of law. The court overruled its demurrer and ordered the special defense stricken from the answer, and gave judgment for plaintiff as prayed for.

Thus upon defendant's appeal, the single question presented is the construction of section 36. Plaintiff contends that the obvious import and meaning of the section is that when, for any and all purposes, seventy per cent of the fund has been expended, or liabilities to the amount of seventy per cent have been incurred, no more of the fund's money may be expended prior to January first, excepting only for the emergency purposes enumerated in the section. Defendant, on the other hand, contends that the section excepts from the seventy per cent limitation any moneys which may have been expended for emergency purposes, or, phrasing it differently, that the section limits only the ordinary expenditures before January first to seventy per cent of the auditor's estimate.

It seems apparent that respondent's construction is the one which the language most obviously bears. If an emergency has arisen, all of the moneys may, for such emergency pur-

poses, be expended or liabilities incurred for their expenditure, before the first of January. But if, for any purpose, liabilities amounting to seventy per cent have been incurred before the first of January, thereafter and until the first of January no more moneys may be expended, saving for emergency purposes alone. If the statute had intended, as appellant insists, that all expenditures for emergency purposes should be deducted from the seventy per cent limitation, we should look for some clearer expression of that purpose than can be found from a reading of the statute. In the absence of such expression, the more obvious interpretation must prevail, the interpretation contended for by respondent and given to the statute by the trial court.

For which reasons the rulings of the trial court are approved and the judgment appealed from is affirmed.

Lorigan, J., Shaw, J., Sloss, J., and Angellotti, J., concurred.

[S. F. No. 4682. Department Two.—March 12, 1908.]

J. H. LEVY, Respondent, v. M. J. LYON, Appellant.

VENDOR AND VENDEE—OPTION TO PURCHASE LAND—UNILATERAL CONTRACT—TENDER OF PERFORMANCE.—An option for the purchase of land, which by its terms contains a promise by the owner to sell on certain conditions, without any obligation to buy on the part of the person to whom the option is given, is a unilateral contract, and becomes mutual only in the event that the latter should, within a reasonable time and before a withdrawal of the offer, make tender of performance on his part. Performance upon the part of him to whom the option runs consists of a valid tender of the amount due under the contract, coupled with a demand for a deed.

ID.—OWNER MAY QUIET TITLE.—The owner of the land may maintain an action to quiet his title thereto against the person to whom such option was given, and who, for more than four years after the execution of the option, has failed to make tender of performance.

APPEAL from a judgment of the Superior Court of Santa Clara County. M. H. Hyland, Judge.

The facts are stated in the opinion of the court.

Milton L. Schmitt, for Appellant.

E. M. Rosenthal, for Respondent.

McFARLAND, J.—The plaintiff brought his action to quiet title to certain real property. The action was commenced November 1, 1905. Defendant appeared by answer and cross-complaint, and alleged that on April 6, 1901, plaintiff had executed to him an option for the purchase of the lands in the complaint described, the material portions of which option are as follows: "I hereby agree to sell to M. J. Lyon or assigns, certain property or land, ten acres more or less, adjoining the property of M. J. Lyon on the south, described as follows: [here follows the description] including use of abstract title to said lands, title to be satisfactory to purchaser. Deed to be delivered in shortest possible time without delay"; that on the thirtieth day of the following May he "requested and demanded from said J. H. Levy the deed to the said premises"; that at divers times since he has demanded the delivery of the deed from plaintiff and has requested "at all of said times that the said Levy provide the said Lyon with an abstract of title of said property, in order that the sale contemplated in said agreement herein referred to might be consummated." The prayer of the complaint, amongst other things, is that the court adjudge and decree, "that the said J. H. Levy make, execute and deliver the deed to said premises to the said M. J. Lyon upon the said M. J. Lyon complying with the terms of sale set forth in said agreement."

The option was a unilateral contract, binding the defendant to do nothing and binding only upon the plaintiff; becoming mutual only in the event that the defendant should, within a reasonable time and before the withdrawal of the offer, make tender of performance on his part. In such a contract, performance upon the part of him to whom the option runs consists of a valid tender of the amount due under the contract, coupled with a demand for the deed. This, defendant nowhere pleads that he made. He specifically pleads that he demanded a deed, but nowhere avers that

he ever tendered the consideration for the deed. More than four years after the execution of the option he seeks to have a court of equity declare it to be a subsisting, valid, and binding obligation on the part of the owner of the land, without any tender of performance ever having been made. The general demurrer to the cross-complaint and answer were properly sustained, and as this option constitutes the sole claim of defendant to title in the property, the judgment quieting that title in favor of plaintiff was proper.

The judgment appealed from is affirmed.

Henshaw, J., and Lorigan, J., concurred.

[Sac. No. 1469. In Bank.—March 13, 1908.]

A. H. CARPENTER, Appellant, v. W. F. SIBLEY et al.,
Respondents.

MALICIOUS PROSECUTION—SUFFICIENCY OF COMPLAINT—MALICE—WANT OF PROBABLE CAUSE—CRIMINAL CONVICTION PROCURED BY FRAUD.—Though, to sustain a malicious prosecution, both malice and want of probable cause must be alleged; yet the averment of a criminal conviction is not inconsistent with the averment of want of probable cause, where it is alleged to have been obtained by fraud of the defendants, and their use of evidence known to be perjured and by their intimidation and coercion of the jury to render a false verdict against the plaintiff.

Id.—EXTRINSIC FRAUD NOT REQUIRED.—The rule that only extrinsic fraud can be shown to set aside a judgment, does not apply to the case of a malicious prosecution and conviction of the plaintiff without probable cause, alleged to have been procured directly by fraud and perjured testimony, and unfair conduct on the part of the defendants.

Id.—ERRONEOUS EXCLUSION OF EVIDENCE.—Where the complaint states a cause of action for malicious prosecution, it is erroneous to exclude evidence in support of the cause of action alleged.

APPEAL from a judgment of the Superior Court of San Joaquin County. F. H. Smith, Judge.

The facts are stated in the opinion of the court.

A. H. Carpenter, *in pro. per.*, for Appellant.

Nicol & Orr, Louttit & Louttit, and C. L. Neumiller, for Respondents.

HENSHAW, J.—Plaintiff filed his complaint against the defendants, the district attorney and the sheriff of San Joaquin County, with others, seeking a recovery for malicious prosecution. Defendants interposed a general demurrer to the complaint, which was overruled. Subsequently they joined issue by answering, a jury was impaneled at the request of the plaintiff, and defendants again interposed their general demurrer in the form of objection to the introduction of any evidence because of insufficient facts alleged in the complaint. This objection was timely, since it may be interposed at any stage of the case. (*Buckman v. Hatch*, 139 Cal. 53, [72 Pac. 445]; *Bell v. Thompson*, 147 Cal. 689, [82 Pac. 327]; *Hall v. Linn*, 8 Colo. 264, [5 Pac. 643].) The court sustained this objection, and, plaintiff declining to amend, a judgment of dismissal was entered and plaintiff appeals.

Plaintiff charged in his complaint that the district attorney and the assistant district attorney and the sheriff and other persons maliciously and feloniously conspired and agreed to falsely charge and accuse the plaintiff of the crime of subornation of perjury, and to convict and punish him therefor; that in pursuance of this conspiracy the conspirators unlawfully procured false evidence to be given before the grand jury of the county, by means of which false evidence they caused plaintiff to be wrongfully and unlawfully indicted for the crime of subornation of perjury; that the indictment was insufficient in form and substance and did not state a public offense; that it was presented to the superior court. Plaintiff was arraigned thereon and pleaded not guilty. Subsequently his trial was had before a jury, and "the said conspirators then and there, during the trial of said case, made use of the false and perjured evidence of thieves and perjurers, which they had corruptly and maliciously procured by means of promises of immunity from crimes and other inducements, and offered and introduced such testimony, which they then and there knew to be false, in evidence at said trial against plaintiff." There then follow allegations of intimidation whereby the jury was

coerced into bringing in a false verdict; that judgment of guilty was entered upon the verdict, and plaintiff was sentenced to a term of imprisonment; that he appealed to the supreme court of the state, making application for bail and for a certificate of probable cause pending his appeal, and that the granting of the one and the issuance of the other were opposed by defendants; that he suffered two hundred and sixty-one days of imprisonment; that the supreme court reversed the judgment and the cause was remanded for a new trial, and subsequently, upon the application and motion of the district attorney made in open court, the superior court dismissed the action and ordered plaintiff released and his bondsmen discharged.

Respondents' argument, in support of their contention as to the insufficiency of the complaint, is, that in order to support an action for malicious prosecution the plaintiff must allege malice and want of probable cause for instituting the action complained of, and this of course is well settled. (*Holliday v. Holliday*, 123 Cal. 26, [55 Pac. 703]; *Dowdell v. Carpy*, 129 Cal. 168, [61 Pac. 948].) They urge further that probable cause is shown by a judgment of conviction, even though that judgment be afterwards reversed, and there is authority of much weight supporting this contention. (*Root v. Rose*, 6 N. Dak. 575, [72 N. W. 1023]; *Nehr v. Dobbs*, 47 Neb. 867, [66 N. W. 864].) Respondents next contend that the complaint itself shows plaintiff's conviction and thereby conclusively establishes, against his pleading, the presence of probable cause for his prosecution. Respondents recognize that the general principle that the conviction establishes probable cause is subject to the modification that the judgment of conviction has not been procured by fraud at the instance or instigation of the defendants. Such, of course, is the established rule. (*Holliday v. Holliday*, 123 Cal. 26, [55 Pac. 703]; *Crescent Live Stock Co. v. Butchers' Union*, 120 U. S. 141, [7 Sup. Ct. 472].) Respondents then argue that the only fraud which will avail the plaintiff to overcome the presumption of probable cause established by the conviction is extrinsic fraud which would justify an action to set aside the judgment. Here respondents fall into error. The rule that only extrinsic fraud may be made the basis of an action to set aside a judgment is a rule founded in necessity. It is to the

interest of the state that there should be an end to litigation. If it were permitted that a litigant could maintain an action to overthrow a judgment upon the ground that perjured testimony had been employed against him, or upon any other ground than extrinsic fraud, litigation would have no end. (*Pico v. Cohn*, 91 Cal. 129, [25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537].) But this is very far from saying that because the law denies to a litigant this particular form of redress for such an injury, it denies him any redress whatsoever. Certainly if a man has procured an unjust judgment by the knowing use of false and perjured testimony, he has perpetrated a great private wrong against his adversary. If that judgment is in the form of a judgment of criminal conviction, it would be obnoxious to every one's sense of right and justice to say that because the infamy had been successful to the result of a conviction, the probable cause for the prosecution was thus conclusively established against a man who had thus been doubly wronged. Therefore, while it may be true, that the fraud alleged in this complaint is not such a fraud as would support an action for the setting aside of a judgment, it is still a fraud which will support an action for a remedy for the private wrong thus committed. So we find it laid down that the general rule now is, "that if the declaration or complaint shows a conviction of the plaintiff, yet if it be averred that the conviction was procured by fraud, perjury or subornation of perjury, or other unfair conduct on the part of the defendant, the presumption of probable cause is effectually rebutted." (13 Ency. of Plead. & Prac., p. 449 and note; *Spring v. Besore*; 12 B. Mon. (Ky.) 555; *Ross v. Hixon*, 46 Kan. 550, [26 Am. St. Rep. 123, 26 Pac. 955]; *Crescent Live Stock Co. v. Butchers' Union*, 120 U. S. 141, [7 Sup. Ct. 472])

It follows from the foregoing that the court erred in sustaining defendants' objection to the introduction of evidence and in dismissing the action. Therefore, it is ordered that the judgment be reversed and the cause restored to the calendar of the trial court.

Shaw, J., Angellotti, J., Sloss, J., McFarland, J., and Lorigan, J., concurred.

[Sac. No. 1580. In Bank.—March 13, 1908.]

H. P. ANDERSON, Appellant, v. **AMALIA SCHLOESSER**,
Defendant; **GEORGE F. STONE** (Substituted Defendant), Respondent.

CORPORATIONS—ACTION AGAINST STOCKHOLDER—ATTACHMENT OF REAL ESTATE—SALE UNDER EXECUTION—TRANSFER BY DEFENDANT—SUBSTITUTION NOT PERMISSIBLE.—In an action to enforce the liability of a stockholder, upon a contract by the corporation with plaintiff, in which real estate belonging to the defendant was attached and sold under execution upon a money judgment against defendant, a transfer by the defendant of the attached real estate pending suit, is not such a transfer of an interest in the action, as to entitle the transferee to be substituted as party defendant under section 385 of the Code of Civil Procedure, regardless of the fact whether the service of the summons upon the original defendant was personal, or by publication.

ID.—SUBJECT OF ACTION DETERMINED BY COMPLAINT—NO RIGHT TO JUDGMENT AGAINST TRANSFEE—SUBJECT NOT AFFECTED BY ATTACHMENT.—The subject of the action is determined from the complaint, which shows only a right of action against the original defendant, as a stockholder, and no right to any judgment against a transferee of her property. The subject of the action is unaffected by the levy of an attachment, the effect of which is merely to create a lien as security for any judgment that might be recovered against the defendant.

ID.—EFFECT OF DEATH OF NON-RESIDENT DEFENDANT—TRANSFEE NOT A REPRESENTATIVE—JUDGMENT PAYABLE IN COURSE OF ADMINISTRATION.—The death of the original non-resident defendant, after her transfer to defendant pending suit, could not confer upon him any right to substitution as her representative. But if there should be administration of her estate in this state, a claim of the demand here sued upon could be presented to her executor or administrator, and be made the basis of a judgment payable in due course of administration, in this action, under section 1512 of the Code of Civil Procedure.

APPEAL from an order of the Superior Court of Lassen County substituting a transferee of the original defendant as defendant. **F. A. Kelley**, Judge.

The facts are stated in the opinion of the court.

Garoutte & Goodwin, and **Pardee & Pardee**, for Appellant.

N. J. Barry, John Sands, and Solinsky & Wehe, for Respondent.

SLOSS, J.—On November 11, 1904, the plaintiff, H. P. Anderson, commenced in the superior court of Lassen County an action against Amalia Schloesser to recover from her certain sums claimed to be due on account of her liability as a stockholder in Hayden Hill Golden Eagle Mining Company, a corporation. A writ of attachment was issued, and was, on the twenty-eighth day of November, 1894, levied on the defendant's interest in the Evening Star Mine. On August 28, 1905, the court gave judgment in favor of the plaintiff against the defendant Amalia Schloesser for \$2,258.70 with costs and interest. It was in form an ordinary money judgment and contained the following recitals: "In this action the defendant, Amalia Schloesser, having been regularly served with process, and having failed to appear and answer plaintiff's complaint herein, and the legal time for answering having expired, and no answer or demurrer having been filed; and by order of the court the default of said defendant having been entered in the premises according to law on the twenty-sixth day of August, 1905;" . . . This judgment was entered on August 28, 1905, and on the twenty-eighth day of October, 1905, all the right, title, and interest of Amalia Schloesser in said Evening Star Mine was sold under writ of execution issued in this cause.

On February 16, 1906, respondent, George F. Stone, filed and served upon the plaintiff a notice that he would move the court for an order substituting him as defendant in the place and stead of said Amalia Schloesser. The grounds of the motion, as stated in the notice, were: "That said action is an action to subject real estate within the state of California to the payment of an indebtedness of the plaintiff Amalia Schloesser; that said Amalia Schloesser was a non-resident of the state of California and is now dead, and that subsequent to the commencement of said action all the right, title and interest of the said Amalia Schloesser of, in and to said real estate has been transferred to the said George F. Stone, and that he is now the legal owner thereof." Upon the hearing of the motion Stone offered in support of his motion the affidavit of one Barry alleging that the action "is an

action commenced against a non-resident of the state to subject certain real estate situated in the county of Lassen, . . . and known as the Evening Star Mine, . . . to the payment of an alleged indebtedness of said defendant; that subsequent to the commencement of said action defendant transferred all her right, title and interest of, in and to said Evening Star Mine to George F. Stone, and that said George F. Stone is now the legal owner of said real estate; that affiant is informed and believes, and upon such information and belief alleges the fact to be, that the said Amalia Schloesser is now dead." In addition, Stone offered in evidence plaintiff's complaint in the action. This was a complaint which alleged that the Hayden Hill Golden Eagle Mining Company was indebted on certain contracts to the plaintiff and that the defendant was the holder and owner of one half of the subscribed and issued capital stock of said corporation. It alleged further that the defendant Schloesser was a resident of the state of Illinois and the owner of an interest in the Evening Star Mine, and "that this action was brought for the purpose of subjecting said defendant's interest in said mine or mining claim to the payment of such proportion of the indebtedness aforesaid as said defendant may be found legally liable for." The complaint prayed judgment against said defendant for one half of the amount of the indebtedness of the corporation with interest. In opposition to the motion the plaintiff offered an affidavit stating that the action did not relate to or affect the title, the possession, or the right of possession of any real property, and setting forth the facts as to the issuance of the attachment, the recovery and entry of judgment, and the execution sale as hereinbefore stated. It further alleged that the conveyance to Stone was not made until the twenty-first day of January, 1905, after the levy of the writ of attachment. The court granted the motion for the substitution of Stone as defendant in place of Amalia Schloesser, and plaintiff appeals from the order so made.

Section 385 of the Code of Civil Procedure provides that "an action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against

his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding."

The respondent's right to be substituted rests, if it can be supported at all, upon the last sentence of this section. He claims by reason of a transfer made to him by Amalia Schloesser in her lifetime, not in the capacity of one who as representative, or otherwise, succeeded to her interest by reason of her death or disability. The fact that, after the transfer to Stone, his grantor died, is therefore a false quantity in the case. Whatever rights Stone had were derived from the conveyance to him, and were fixed at the time of such conveyance.

Was this such a transfer of interest in the "action" or in the "cause of action," as justified the substitution of Stone in place of the original defendant? The order appealed from not only made Stone a party to the suit, with the right to take such steps therein as might be necessary to protect his interest, but it eliminated Amalia Schloesser as a party, and prevented the plaintiff, in any future stage of the proceeding, from obtaining any relief against her. The nature of the cause of action is to be determined from the complaint, and the conclusions of witnesses expressed in affidavits can have no weight in this connection. The complaint was simply one to recover money claimed to be due to plaintiff from the defendant Schloesser on contracts made by a corporation of which she was a stockholder. As such stockholder she was directly and primarily liable on these contracts. (*Young v. Rosenbaum*, 39 Cal. 646; *Hyman v. Coleman*, 82 Cal. 650, [16 Am. St. Rep. 178, 23 Pac. 62]; *Knowles v. Sandercock*, 107 Cal. 629, [40 Pac. 1047].) The allegation that the action was brought to subject defendant's interest in the Evening Star Mine to the payment of plaintiff's claim does not alter the fact that plaintiff set forth a case of a personal liability on the part of defendant Schloesser, entitling him to the relief which he asked,—i. e. a general judgment against her. On this complaint, the plaintiff had no claim against Stone, and was not entitled to any judgment against him. The effect of levying an attachment against

the property of the defendant was merely to create a lien on that property as security for any judgment that might be recovered against Schloesser. The attached property did not thereby become the subject of the action. The subject of the action consisted, as it had from the outset, of plaintiff's demand against Schloesser. The fact that Stone acquired an interest in the attached property, while it might justify his becoming a party to the action for the purpose of protecting that interest (*Wilson v. Baker*, 64 Cal. 475, [2 Pac. 253]; *Trumpler v. Trumpler*, 123 Cal. 248, [55 Pac. 1008]; *Crescent Canal Co. v. Montgomery*, 124 Cal. 134, [56 Pac. 797]), would furnish no reason for ousting Schloesser as a party, and so depriving plaintiff of his right to a general judgment against her.

The theory upon which the substitution was asked appears from the briefs to have been that, while the action was one for the recovery of a simple money judgment, there was no personal service upon the defendant within the jurisdiction, and that, under the familiar rule declared in *Pennoyer v. Neff*, 95 U. S. 741, and similar cases (*Brown v. Campbell*, 100 Cal. 641, [38 Am. St. Rep. 314, 35 Pac. 433]; *Murray v. Murray*, 115 Cal. 266, [56 Am. St. Rep. 97, 47 Pac. 37]), the judgment obtained on substituted service could not be effectual except to the extent of subjecting to the satisfaction of plaintiff's claim property which had been attached or otherwise brought within the jurisdiction of the court at the inception of the proceedings. It is a sufficient answer to this proposition to say that nowhere in this record does it appear that the judgment was one rendered on substituted service. All that appears regarding service is the recital of the judgment hereinbefore quoted, which is that the defendant Amalia Schloesser had been regularly served with process, and had failed to appear and answer plaintiff's complaint herein. While it is shown that the defendant Schloesser was a non-resident of the state of California, there is nothing in the notice of motion for substitution or in the evidence to indicate that she was not at some time during the pendency of the action within this state, and that she was not while here served with summons. If she was so served, the court of course obtained jurisdiction to render a general judgment against her.

But even if we were to assume that the judgment was rendered on a service by publication, the transferee of the

attached property did not thereby become entitled to the substitution. While the judgment, if based on such service, could not be effectual to any greater extent than to subject the interest of the defendant Schloesser in the attached property to the payment of plaintiff's claim, it is still true that the prayer of the complaint and the facts therein alleged authorized a general judgment against the original defendant. So long as the action was pending it was possible for the court to obtain jurisdiction of that defendant by a personal service or by voluntary appearance on her part. It cannot be urged on behalf of Stone that the plaintiff's right to treat the action as one purely *in personam* ended with the entry of judgment. An action is pending "from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed." (Code Civ. Proc., sec. 1049.) Indeed, the very motion of defendant to be substituted as a party defendant recognizes the action as a pending one. The sole purpose which Stone can have in now coming into the action as a defendant is to attack a judgment already entered. If he should succeed in a motion to set the judgment aside, the plaintiff would be left in the position of having to look solely to the attached property for the satisfaction of his claim, although he had commenced an action to recover a general judgment against a party personally liable. In this respect the case differs materially from *Fay v. Steubenrauch*, 138 Cal. 656, [72 Pac. 156], relied on by respondent. In that case the grantee of mortgaged land was, in a foreclosure suit, substituted for an original defendant, who was not himself the mortgagor, and was not personally liable for the debt.

As we have said, the death of Schloesser can add nothing to the rights of Stone, who succeeds to no right by virtue of her death. It may be remarked, however, that the fact of her death does not destroy the possibility of the court securing jurisdiction to render, in this action, a general judgment against her representatives. If there should be administration of her estate in this state, a claim on the demand here sued upon could be presented to the executor or administrator, and be made the basis of a judgment (payable in due course of administration) in this action. (Code Civ. Proc., sec. 1502.)

The order is reversed.

Shaw, J., Angellotti, J., Lorigan, J., Henshaw, J., and McFarland, J., concurred.

Rehearing denied.

[S. F. No. 4596. In Bank.—March 13, 1908.]

In the Matter of the Estate of ELIZABETH HEWLETT MARTIN, Deceased. JOHN Q. HEWLINGS et al., Appellants, v. STATE OF CALIFORNIA, Respondent.

ESTATES OF DECEASED PERSONS—COLLATERAL INHERITANCE TAX—VESTED RIGHT OF STATE—REPEAL OF LAW INOPERATIVE.—The right of the state to the tax on collateral inheritance, bequests, or devises provided for in the act approved March 25, 1893, and its amendments while in force, vested immediately upon the death of the ancestor, or testator, and its vested rights thereunder to collect or receive any unpaid taxes could not be affected by the repeal of that act and its amendments by the Collateral Inheritance Tax Act of March 20, 1905.

ID.—CONSTITUTIONAL LAW—PROTECTION OF RIGHTS OF STATE.—Under the limitations prescribed by section 31 of article IV of the constitution, it is not within the power of the legislature, either by the repeal of the law in virtue of which the right of the state to the tax in question vested, or by any other means, to grant or donate it to the successor in estate, or to any other person.

ID.—FORMER PROCEDURE INSERTED IN REPEALING ACT NOT REPEALED.—Notwithstanding the express repeal of the act of 1893 and its amendments, the object of the act of 1905 is merely to establish a different amount of taxation and to make it applicable to different persons; and, in so far as provisions of procedure under the former act are found substantially embodied in the latter, they must be deemed mere amendments, within the scope of section 325 of the Political Code, providing that portions of statutes not altered are to be deemed a law from the time when they were first enacted, and such portions apply to taxes previously assessed, the same as if there were no repealing clause in the new act.

ID.—RE-ENACTMENT NEUTRALIZING REPEAL.—Where there is an express repeal of a statute, and at the same time a re-enactment of a portion of its provisions, such re-enactment neutralizes the repeal, in so far as the old law is continued in force; and, in such case, the part of the old law re-enacted operates without interruption.

CLIII Cal.—15

APPEAL from an order of the Superior Court of Santa Clara County directing payment of a collateral inheritance tax. M. H. Hyland, Judge.

The facts are stated in the opinion of the court.

S. F. Lieb, for Appellants.

U. S. Webb, Attorney-General, James H. Campbell, District Attorney, and C. M. Lorigan, for Respondent.

SHAW, J.—Elizabeth Hewlett Martin, a resident of this state, died in the county of Santa Clara on January 2, 1905, leaving a valuable estate. By the terms of her will, which was duly probated, she bequeathed to each of the appellants a sum of money greater than five hundred dollars, amounting in the aggregate to \$38,415.21. None of the appellants was related to the deceased in a degree nearer than that of brother, and, hence, the legacy came within the terms of the act of 1903 (Stats. 1903, p. 268), amending section 1 of the act imposing a tax on inheritance devises and legacies. Section 27 of an act approved March 20, 1905, which took effect July 1, 1905 (Stats. 1905, p. 350), purports to repeal, unconditionally, the act of 1893 providing for a succession tax and all the subsequent amendments thereto, including that of 1903 above mentioned. In due course of administration of the estate a decree of distribution thereof was rendered by the superior court of Santa Clara County on February 2, 1906, declaring that the appellants respectively were the owners of and entitled to receive the legacies bequeathed to them as aforesaid, subject to whatever inheritance tax might be due thereon. Subsequently, on March 2, 1906, upon due notice, the court made an order directing the executor of the estate to deduct from each of said legacies a sum equal to five per cent thereof, as and for a succession tax thereon, and to pay said sums so deducted to the county treasurer. This appeal is taken from that order.

The appellants ask us to overrule the decisions of this court in the *Estate of Stanford*, 126 Cal. 112, [54 Pac. 259, 58 Pac. 462], and *Trippet v. State*, 149 Cal. 521, [86 Pac. 1084], and declare that the repeal of the Collateral Inheritance Tax

Law of 1893, and its amendments, by the act of 1905, operated to deprive the state of the right to collect or receive all succession taxes, accrued under the former law, which had not been paid or ordered to be paid to the state at the time the repeal took effect, on July 1, 1905. The briefs filed for the appellants in *Trippet v. State*, 149 Cal. 521, [86 Pac. 1084], are referred to by counsel and made to constitute the argument on behalf of the appellants in this case. No additional points are presented. Even if we were disposed to doubt the soundness of those decisions, and were to concede that vested rights would not be affected by overruling them, we would hesitate to overrule decisions so well and thoroughly considered as those mentioned. But after again considering the arguments presented, we are satisfied that the conclusion reached in those cases is correct.

The argument of the appellants is that the decision in *Trippet v. State* is based wholly on the authority and reasoning of the opinion in *Estate of Stanford*, and that the conclusion in the Stanford case was founded solely upon the proposition that the effect of the law of 1893 and its amendments was to provide for the succession to property upon the death of the owner, and not to establish a tax. And this proposition, it is claimed, is false for two reasons: 1. Because the language of the statute does not permit that construction, and, 2. Because, if it did, the title of the act would not include the subject and the act would be void. It is further argued that the law does not in fact provide for a tax, the right of the state thereto does not vest until payment, or until a judicial order has been made for the payment, and that a repeal of the law before either event, as in the present case, extinguishes the inchoate right of the state to the unpaid tax.

The opinion in *Estate of Stanford* does not have the effect claimed. It does not hold that law in question provides that the state shall succeed as an heir in certain classes of cases to five per cent of the property of the decedent. Some of its phraseology may perhaps be consistent with such an idea, if taken separately from the context, but the real meaning and effect of the decision is that the law establishes a succession tax in certain cases, and that the right of the state to such tax vests immediately upon the death of the ancestor or testator, and, hence, that the repeal of the law does not affect

the right of the state to the tax. The law, in effect, created a lien in favor of the state on the property for the amount of the tax thereon. This right to the tax in question here, and the lien therefor, vested in and became the property of the state upon the death of Elizabeth Hewlett Martin, in January, 1905. Under the limitations prescribed by section 31 of article IV of the constitution, it is not within the power of the legislature, either by the repeal of the law in virtue of which the right vested, or by any other means, to grant or donate it to the successor in estate or to any other person.

The law of 1893 and its amendments provided that the executor or administrator of the particular estate should deduct from all money legacies, or money of the intestate, in his hands for distribution, the amount of the succession tax due thereon and that he should in other cases collect from the distributee the amount of the tax due on the share distributed, before delivery thereof to the party entitled, and should pay the said tax to the county treasurer for use of the state (Stats. 1895, sec. 6, p. 35; Stats. 1893, sec. 8, p. 195).

If this law is still in force, no order of the court was required to give the executor authority to deduct from the money legacies distributed to the appellants the succession tax thereon and to pay the same to the county treasurer. In that event the order would be harmless, even if unnecessary. It is claimed that the express repeal, by the act of 1905, of the previous law for succession taxes, if not effective to deprive the state of the right to the tax here involved, is, at least, valid so far as it repeals the provisions of sections 6 and 8 aforesaid, providing for its retention and payment by the executor, and, hence, that the executor had no authority to pay the tax for the legatees, and that the court had no power to make the order giving him such authority.

We do not think that these provisions were repealed. The act of 1905 containing the repealing clause above mentioned is practically a revision of the act of 1893 and its amendments, providing for succession taxes. Certain changes are made in the new law in regard to the persons on whom such tax is imposed, the exemptions therefrom, and in the rate of tax to be imposed upon the different persons. These changes are found, for the most part, in sections 1, 2, 3, and 4 of the new law, which cover the subjects embraced in section 1 of the

old law. The other portions of the old law are substantially re-enacted in the act of 1905 with a few alterations and additions which do not affect the question. The aforesaid section 6 of the former law is, word for word, the same as section 9 of the new act, and section 8 of the former law is identical with section 11 of the new act, with the exception of a few words of trifling import. We must presume that the legislature of 1905 was aware of its want of power, under the decision of this court in *Estate of Stanford*, to release, surrender, or discharge the taxes previously accrued and remaining uncollected. The re-enactment of the provisions of the former law respecting the payment and collection of succession taxes is to be considered as having been done with knowledge of the existence of these uncollected taxes and with the intent to continue in force the mode and means for the collection thereof. These re-enactments come within the scope and effect of section 325 of the Political Code, declaring that, when a part of a statute is amended, it is "not to be considered as having been repealed and re-enacted in the amended form; but the portions which are not altered are to be considered as having been the law from the time when they were enacted." The rule particularly applicable to this case is thus stated in Sutherland on Statutory Construction (2d ed., sec. 238): "Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time." Speaking of a similar case, the supreme court of the United States, in *Bear Lake I. Co. v. Garland*, 164 U. S. 11, [17 Sup. Ct. 7], say: "Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1888 when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in the new act." The following authorities are of similar effect: Endlich on Interpretation, sec. 490; *Pratt v. Swan*, 16 Utah, 483, [52 Pac. 1094]; *Howlett v. Chcetham*, 17 Wash. 626, [50 Pac. 522];

Pacific M. S. Co. v. Joliffe, 2 Wall. 456; *Wright v. Oakley*, 5 Met. 406; *Sabin v. Connor*, 21 Fed. Cas. 125; *United Hebrew Assoc. v. Benshimol*, 130 Mass. 327; *Anding v. Levy*, 57 Miss. 59, [34 Am. Rep. 435]; *Middleton v. New Jersey etc. Co.*, 26 N. J. Eq. 274; *State v. Bemis*, 54 Neb. 733, [64 N. W. 350]. The effect of the act of 1905 was to establish a different rate of taxation and make it applicable to different persons with respect to all succession taxes accruing thereafter, but otherwise the provisions of the previous act incorporated into the new act, relating to the payment and collection of succession taxes, remained in force and applied to taxes previously assessed, the same as if there had been no express repealing clause in the new act. The same session of the legislature amended section 1669 of the Code of Civil Procedure, so as to provide that before any decree of distribution of an estate is made the court must be satisfied that "any inheritance tax which is due and payable has been fully paid." (Stats. 1905, p. 83.) This amendment took effect May 6, 1905, and remained in force, notwithstanding the repeal of the inheritance tax law of 1893. Under its provisions, in connection with the provisions of the former act re-enacted in the Revisory Act, there can be no doubt that the court had authority to make the order appealed from.

The order is affirmed.

Angellotti, J., Sloss, J., Henshaw, J., and Lorigan, J., concurred.

[Sac. No. 1577. In Bank.—March 13, 1908.]

WOOD, CURTIS & COMPANY, Respondent, v. EL DORADO LUMBER COMPANY et al., Appellants.

MECHANICS' LIENS—CONSTRUCTION OF RAILROAD—LETTING OF HORSES AND HARNESS TO CONTRACTOR—LESSOR NOT ENTITLED TO LIEN.—One who has let horses and harness belonging to him to one who has contracted to build a railroad, at a stipulated price per month, the contractor having full control thereof during the hiring and having employed and paid the drivers thereof, cannot be held to have bestowed any labor upon the railroad, or to be entitled to

enforce any lien thereon, as against the owner, under section 1183 of the Code of Civil Procedure, as a subcontractor.

ID.—LABOR ENHANCED BY USE OF APPLIANCES—RENT OF APPLIANCES.—

Though, in proper cases, the value of labor may be enhanced by the use of tools and appliances, and the laborer may claim a lien for said value; yet this rule has no application where one merely rents appliances to another who labors on the structure, in which case, it can never be said that he has himself bestowed labor on that structure within the meaning of our law.

APPEAL from a judgment of the Superior Court of El Dorado County, and from an order denying a new trial. N. D. Arnot, Judge.

The facts are stated in the opinion of the court.

W. J. Bartnett, Chas. A. Gray, and Chas. A. Swisler, for Appellants.

L. T. Hatfield, for Respondent.

HENSHAW, J.—The facts involved in this appeal, briefly stated, are as follows: On February 17, 1904, the defendant and appellant herein, the El Dorado Lumber Company, entered into a contract with the defendants Carney, Roy & Carney for the construction of a single-track railroad, upon a private right of way from North Placerville to its storage yards in El Dorado County. Thereafter, and during the progress of construction work upon said right of way, the plaintiff corporation let to the firm of Carney, Roy & Carney, fifty-three head of horses, with their harness, at the rate of ten dollars per month for each horse and harness. An examination of the record shows that these horses were used by Messrs. Carney, Roy & Carney in the course of the construction work, and that the drivers of the horses were hired and paid for by them. Suit was brought in the superior court of El Dorado County, and on October 31, 1904, the default was entered of defendants Edward Carney, E. J. Roy, and Edward Carney, Jr., and the case was tried as to the defendant corporation.

An examination of the record shows that there was no conflict of evidence upon the proposition that the transaction between plaintiff and the contractors, Carney, Roy & Carney,

was simply a letting by plaintiff of the horses and harness to the contractors for the doing of this work at a stipulated price per month for each horse. The contractors had full control of the horses during the time of the hiring, and employed and paid the drivers thereof. So far as the findings may be construed otherwise, they are unsupported by the evidence. Upon the theory that in the use by the contractors of plaintiff's horses and harness in the work of constructing the railroad plaintiff had performed labor upon the railroad, the trial court found it to be entitled to a lien on the railroad for the amount due from the contractors for such hiring.

The question, then, which the trial court answered in favor of plaintiff is: Did plaintiff by this letting of its horses at a stipulated price per month "bestow labor" upon the work so as to entitle it to a lien under section 1183 of the Code of Civil Procedure? Respondent contends that upon the reasoning, if not upon the direct authority, of *Macomber v. Bigelow*, 126 Cal. 9, [58 Pac. 312], the trial court was clearly right in its ruling. But in *Macomber v. Bigelow* this court was construing the provisions of the Mechanics' Lien Law with reference to the right to a lien of a subcontractor who had not actually labored himself upon the work, but had "bestowed" upon it the labor of his servants and employees, and it was held that such a subcontractor brought himself within the purview of the statute. So far, and no further, *Macomber v. Bigelow* went. We are asked here to hold (since to uphold the ruling of the trial court it must be so held) that one who merely lets, hires, or rents tools, implements, or machinery of any kind to one employed upon the work becomes thereby a subcontractor and entitled to a lien for the value of the use of such tools, implements, and machinery as he has let or leased. Yet, certainly, the plaintiff was in no sense a subcontractor. He occupied no contractual position whatsoever touching the work. He had merely turned over to the contractor, under a contract of hiring, certain personal property which the contractor himself used upon the work. The fact that the personal property which was so turned over consisted of horses and their harness should not be allowed to cloud the issue. The horses, as horses, were no more entitled to liens than were the harnesses themselves. Each and both together were but convenient appliances for

the doing of specific work. In the ultimate analysis there is no difference in principle, whether draying is done by horses and wagons or by automobile trucks; whether grading is done by horses and scrapers or by traction engines and steam pad-dies. One and all are in their essence but tools and machinery. This being so, if the ruling for which respondent contends is the correct one, it must result that if A leases to B a derrick or hoist for use upon the buildings which B is constructing, A will have a lien upon each of those buildings for the value of the use of the derrick. Or, in still simpler form, if a carpenter lets to a fellow-carpenter his chest of tools for fifty cents a day, the former will have a lien upon every building upon which the latter works and uses the rented tools. The illustration reduced to its simplicity shows the untenableness, if not the absurdity, of the contention. Giving to the law its broadest and most beneficent construction, it can never be said that one who merely rents appliances to another who labors upon a structure has himself bestowed labor upon that structure within the meaning of our law. In this, of course, there is no denial, but a distinct affirmance of the fact that, in proper cases, the value of labor may be enhanced by the use of tools and appliances, and, in such cases, a lien may be properly given for such value, as in *West Coast Lumber Co. v. Newkirk*, 80 Cal. 280, [22 Pac. 231], and in *McClain v. Hutton*, 131 Cal. 132, [61 Pac. 273, 63 Pac. 182]. Upon the other hand, reference may be made to *Adams v. Burbank*, 103 Cal. 646, [37 Pac. 390], where it was held that a teamster who had been employed by the brick men to haul brick for them, who had no contract with the contractor and owed him no liability, had not performed labor upon the building and was not entitled to a lien. Unquestionably the brick men would have been allowed a lien in a proper case for this cartage as a part of the cost of the material.

The case of *Clark v. Brown*, 141 Cal. 93, [74 Pac. 548], relied upon by appellant, has not been overlooked. *Clark v. Brown* was an action for a lien upon a threshing-machine, brought under the act which provided for a lien for the wages of persons employed as laborers. It was there held by the trial court, and its ruling approved by this court, that the law limited the lien to the wages of the persons employed, and did not and could not include the value of the services

of horses rented to the owner of the machine and used by him in its work. In principle the case is identical with the one at bar. The distinction which is sought to be drawn between the two rests upon the broader language of the Mechanics' Lien Law. But even that language, as we have said, does not warrant the award of a lien in such a case.

For the foregoing reasons the judgment and order denying a new trial are reversed and the cause remanded.

Angellotti, J., Shaw, J., Sloss, J., and Lorigan, J., concurred.

Rehearing denied.

[S. F. No. 3790. In Bank.—March 13, 1908.]

TERESA BELL, Administratrix of Estate of Thomas Bell,
Deceased, Appellant, v. BANK OF CALIFORNIA,
Respondent.

PLEDGES—INSUFFICIENT COMPLAINT FOR REDEMPTION.—A complaint for redemption of property pledged which shows on its face that the property has passed out of the possession and control of the pledgor, and that it has not the ability to perform the contract of pledge or to comply with a decree for specific performance thereof, and which does not allege that defendant has other sufficient shares of pledged stock in its possession out of which performance might be adjudged, and does not allege a tender of the amount secured by the pledge, or any offer to perform the contract on plaintiff's part, the precise amount of which is shown in the complaint, fails to state a cause of action for redemption.

ID.—CAUSE OF ACTION FOR CLAIM AND DELIVERY NOT STATED.—The complaint is insufficient to state a cause of action in claim and delivery where it does not seek the recovery of specific certificates of stock; nor will claim and delivery lie for shares of stock merely as intangible property.

ID.—CAUSE OF ACTION FOR DAMAGES FOR CONVERSION—STATUTE OF LIMITATIONS.—If the complaint be regarded as setting forth a cause of action for damages for the conversion of pledged property, or for an excess in value of the pledged property over the amount of the debt, either of such causes of action arose upon the transfer of the securities by the defendant, and when the complaint was

filed, more than three years after such transfer, either of such causes of action is barred by subdivision 3 of section 338 of the Civil Code.

ID.—PRAYER FOR ACCOUNTING OF VALUE OF PLEDGED PROPERTY IMMATERIAL.—The prayer for an accounting of the value of the pledged property is immaterial to either cause alleged. The cause of action, whether legal or equitable, is determined by the sufficiency of the allegations of the complaint. Any accounting, if had, would be merely incidental to a main cause of action, if any were stated, and such incidental relief cannot be granted, without reference to any cause of action.

ID.—DISMISSAL OF ACTION UPON ORDER SUSTAINING DEMURRER.—Where no leave to amend the insufficient complaint was applied for, it was not error, or an abuse of discretion, to order a dismissal of the action upon the order sustaining a general demurrer to the complaint.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

T. Z. Blakeman, for Appellant.

James M. Allen, for Respondent.

SLOSS, J.—This is an appeal by the plaintiff from a judgment of dismissal entered upon an order sustaining a demurrer to her complaint.

The complaint alleges the following facts: Thomas Bell died on October 16, 1892. His will was admitted to probate and letters testamentary were issued to the executors named in the will. Two of the three executors having resigned, the third was removed on March 23, 1900, and on February 19, 1902, the plaintiff was appointed administratrix with the will annexed.

At the time of his death, Thomas Bell was indebted to the defendant, the Bank of California, in the sum of fifty thousand dollars. Of this amount thirty thousand dollars was evidenced by the note of Thomas Bell, five thousand dollars by the note of G. Staacke, ten thousand dollars by the note of John S. Bell, and the remaining five thousand dollars by the note of J. B. Shaw. Each of the three last-mentioned notes was payable to Thomas Bell and was by him indorsed and

delivered to the defendant. As collateral security for the payment of said indebtedness, Bell had delivered to the bank 675 shares of the capital stock of the Bellingham Bay & British Columbia Railroad Company, 3,401 shares of the Black Diamond Coal Mining Company, 3,435 shares of the Bellingham Bay Improvement Company, 130 shares of the capital stock of the Bank of California, and the promissory note of one L. L. Robinson for \$29,262.18, payable to the order of Thomas Bell. On July 20, 1893, within ten months after the first publication of notice to creditors of the estate of Bell, the defendant presented to the executors its claim, in which it set out its demand upon the foregoing notes, alleged that all of said notes were secured by a pledge of the shares of stock above mentioned and of the Robinson note, and claimed, in addition, two items of unsecured indebtedness, amounting to \$3,976.69 and \$3,859.10, respectively. This claim was allowed by the executors, approved by the judge of the superior court, and filed. During the year 1893 the 130 shares of the capital stock of the Bank of California were sold, pursuant to an order of court, for the sum of \$28,757.50, fourteen thousand dollars of which was applied by the defendant on the payment of its claim and the balance turned over to the estate.

The plaintiff alleges upon information and belief that the whole of said sum of fifty thousand dollars was not, at the date of Thomas Bell's death, secured by the pledge of the personal property described, but that five thousand dollars of it,—to wit, that portion evidenced by the note of G. Staacke,—was not secured by the pledge of any part of said property. It is alleged that "on or about the first day of April, 1898, the said defendant without any order of court, or authority therefor whatever, assigned, transferred and delivered to one D. O. Mills" all of the pledged shares of stock (except the stock of the Bank of California already disposed of) together with the certificates representing the same, and "received from the said Mills upon the said assignment the total sum of \$40,053.70 after deducting some expenses of said assignment and transfer . . . which sum of \$40,053.70 was by said defendant placed to the credit of said estate upon its claim." These shares of stock were of great value and largely in excess of the total indebtedness of the estate to said bank,

but none of the shares were of known or recognized market value. They were not listed upon any stock exchange nor were they dealt in by the public, and it was impossible to ascertain their value without taking an account of the assets and liabilities of the said corporations.

On the seventh day of November, 1900, the defendant collected upon the note of L. L. Robinson, held as collateral, the sum of \$30,847.18, and took and applied to its own use therefrom the sum of \$22,384.47.

The plaintiff alleges that, as administratrix, she has demanded of the defendant that it account to her for said shares of capital stock pledged to it (except the stock of the Bank of California), and for a statement showing the amount, if any, due from the estate of Bell to said defendant for account of which the said personal property was pledged, "and that this plaintiff be permitted to redeem the said personal property, to wit, the said shares of the capital stock of the said corporations last above mentioned, and that this plaintiff be permitted, if there remains any portion of the debt for which said personal property was pledged, to redeem such personal property by paying to said defendant the amount that may be ascertained to be due to it upon that portion of the indebtedness secured by the pledge of the said personal property." The defendant refused "to make such accounting or to permit plaintiff to redeem the said shares of the capital stock." Said defendant unjustly and without right claims the right to apply out of the proceeds of the sale of said personal property, pledged as aforesaid, and out of the collection of the Robinson note, "in payment of the other portion of its claim approved against the estate of said Bell, to wit: the last two items of said claim, amounting respectively to the sum of \$3,976.66 and \$3,859.10." The prayer of the complaint is that the defendant be required to account in accordance with the demand alleged to have been made, and that the plaintiff be permitted to redeem the shares of stock pledged, except those sold under order of court, upon the payment to defendant of any balance found to be due, and the plaintiff offers to pay whatever sum may be due on account of any portion of the secured indebtedness remaining unpaid, upon delivery of said shares of stock. There is also a prayer for general relief.

The grounds of the demurrer, which, as we have stated, was sustained, are the want of facts sufficient to constitute a cause of action, the barring of the cause of action by the statute of limitations, certain points of alleged ambiguity and uncertainty, and misjoinder of causes of action.

Where property is pledged to secure specific indebtedness, the pledgee has no right to hold it as security for any other obligation. (Civ. Code, sec. 2891; *Reynes v. Dumont*, 130 U. S. 354, [9 Sup. Ct. 486].) If the pledgee wrongfully parts with the property, or, upon tender of the secured debt, refuses to return it, the pledgor may maintain an action at law for damages or, where such relief is appropriate, to regain the property itself by claim and delivery. Or he may, if there are circumstances authorizing a demand for equitable relief, and redemption is possible, bring a suit to establish and enforce his right of redemption.

The complaint in this case was evidently framed with a view to enforcing the plaintiff's right to redeem the shares of stock pledged by her testator, rather than to obtain damages for the conversion. It cannot be an action in claim and delivery, since it is not aimed at specific certificates alleged to be in the possession of defendant. For shares of stock as intangible property, this form of action will not lie. (*Ashton v. Heydenfeldt*, 124 Cal. 14, [56 Pac. 624].) But, inasmuch as under our system the court may grant any relief, legal or equitable, to which a party may be entitled, the mere fact that plaintiff in framing her complaint proceeded upon a certain theory of her rights affords no ground for sustaining a general demurrer, if the complaint alleges facts which entitle her to relief upon some other theory.

Viewed as a bill to redeem a pledge, the complaint is defective in that it shows affirmatively that the pledged property has passed out of the possession and control of the defendant. It is alleged that the defendant "assigned, transferred and delivered" to D. O. Mills the shares of stock here sought to be redeemed, and received on such assignment the sum of \$40,053.70. "A bill in equity to redeem personal property is essentially a bill for specific performance." (*Angus v. Robinson's Admr.*, 62 Vt. 60, [19 Atl. 993].) By such bill the pledgor asks the court to compel the pledgee to carry out his agreement to return the pledged property upon pay-

ment of the debt secured by it. A court of equity will not decree the specific performance of a contract which the defendant has not the ability to perform. (26 Am. & Eng. Ency. of Law, 2d ed., p. 39; *Shields v. Trammell*, 19 Ark. 51; *Saur v. Ferris*, 145 Ill. 115, [34 N. E. 52]; *Ferrier v. Buzick*, 2 Iowa, 136; *Davenport v. Latimer*, 53 S. C. 563, [31 S. E. 630]; *Coleman v. Dunton*, 99 Me. 121, [58 Atl. 430].) Accordingly, a bill for specific performance must, at the least, be free from averment that the defendant has not the ability to comply with the decree sought. In *Joseph v. Holt*, 37 Cal. 250, an action by a vendor for specific performance of an agreement for the purchase of real estate, this court said: "It must be that in an action of this kind the complaint must make a case in which the defendant is at least *prima facie* able to perform. . . . Where a party calls upon a court to compel another to do a particular thing, he ought to allege that he can do it and not leave his capacity to do it in doubt or resting on presumption." It has been held that inability to perform is matter of defense to be presented by answer. (*Greenfield v. Carlton*, 30 Ark. 547; *Burden v. Curtis*, 46 N. J. Eq. 468, [19 Atl. 127].) But where, as here, the complaint affirmatively shows that the property involved has passed from the possession and control of the defendant, the right to the relief sought is negated by the bill itself. (*Columbine v. Chichester*, 2 Phila. 27; *Roanoke St. Ry. Co. v. Hicks*, 96 Va. 510, [32 S. E. 295]. See, also, *Angus v. Robinson's Admr.*, *supra*, where this rule was applied to a case of a bill to redeem personal property.)

It is true that, in the case of a pledge of shares of stock in a corporation, the identity of the particular certificates delivered and pledged is not important. (*Atkins v. Gamble*, 42 Cal. 86, [10 Am. Rep. 282].) A sale of these certificates will not constitute a conversion, if the pledgee has at all times had in his possession, ready for delivery to the pledgor upon redemption, similar certificates evidencing a right to the same number of shares. (*Thompson v. Toland*, 48 Cal. 99; *Hayward v. Rogers*, 62 Cal. 348.) It follows that, in an action by the pledgor to redeem, the fact that the particular certificates have been disposed of is not fatal to plaintiff's right. If the pledgee has other certificates for an equal number of shares he may, by the decree, be compelled to transfer them to the

pledgor. (*Krouse v. Woodward*, 110 Cal. 638, [42 Pac. 1084].) But there is no presumption that the pledgee has such certificates, and the plaintiff, who has alleged that the pledgee has no longer the ability to restore the identical property pledged, must, if he seeks the delivery of similar property, allege and show that the defendant is in a position to make such delivery. In *Krouse v. Woodward*, 110 Cal. 638, [42 Pac. 1084], the complaint did so allege and the finding was in accordance with the allegation.

A further objection to the sufficiency of the complaint as a bill for redemption is that there is no allegation of a tender of the amount secured by the pledge. (*Brittan v. Oakland Bank of Savings*, 124 Cal. 282, [71 Am. St. Rep. 58, 57 Pac. 84].) The undertaking of the pledgee is to return the property pledged upon performance of the obligation for which it is pledged as security (*Palmtag v. Doutrick*, 59 Cal. 155, [43 Am. Rep. 245]), and no right of redemption arises until the pledgor has performed or offered to perform such obligation. (Civ. Code, sec. 1439; 22 Am. & Eng. Ency. of Law, 2d ed., p. 58.) No such tender is here alleged. Does the complaint aver facts excusing the want of a tender? It is argued that a tender was not necessary because the bank had already realized from the pledged property enough money to pay all of the secured debt. But this result is reached only by including the money received on the transfer of the stock to Mills. Such transfer is assailed by plaintiff as unauthorized, and it is sought by this action to redeem the stock as if it still remained in possession of the bank, subject to the terms of the pledge. The plaintiff cannot in one breath repudiate this transfer and claim the benefits of it. If the transfer to Mills was void as against the Bell estate, the proceeds realized on that sale cannot be treated by the plaintiff as a payment on account of the debt. The debtor might of course ratify the transfer and the application of the proceeds to the payment of the debt, but such ratification would necessarily destroy the right to claim that the property still remained subject to redemption.

Again, appellant maintains that a tender was unnecessary because the debtor did not know the amount of the debt and was seeking, as a part of her relief, an accounting to determine that amount. (Jones on Pledges, sec. 567; *Castoriano v.*

Dupe, 145 N. Y. 250, [39 N. E. 1065].) The complaint however, shows no such uncertainty as to the amount of the debt as would obviate the necessity of a tender. The claim of the defendant, allowed by the executors and approved by the court, is annexed to the complaint, and shows the precise amount due from the estate to the defendant. The sums received by defendant on account of the claim are specified in the complaint. Nor does it appear that the plaintiff is unable to determine what proportion of the debt was secured by the pledge. All that is shown is that there is a dispute between the parties upon this point, the defendant claiming that all of the notes executed and indorsed by Thomas Bell to the defendant were secured by the pledge, and the plaintiff that the note of G. Staacke for five thousand dollars was not so secured. This dispute furnishes no reason why the plaintiff should not have made a tender. She knew the amount due on the notes which, according to her contention, were alone secured, and could readily have tendered this amount and demanded the return of the pledged property. Section 1511 of the Civil Code provides that "The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate: . . . 3. When the debtor is induced not to make it, by any act of the creditor intended or naturally tending to have that effect done at or before the time at which such performance or offer may be made, and not rescinded before that time." Section 1515 reads: "A refusal by a creditor to accept performance, made before an offer thereof, is equivalent to an offer and refusal, unless, before performance is actually due, he gives notice to the debtor of his willingness to accept it." The mere act of the creditor in designating, in its claim, all of the notes as secured was not such an act as is described in either of these sections. The statement in the claim was not made with a view to indicating the terms upon which the pledgee would consent to return the pledged property, but was merely incidental to making the formal demand necessary, under the statute, to establish the amount of the liability of the estate. It was not an act "intended, or naturally tending" to induce the debtor to omit an offer of performance, and there is nothing to show that it did in fact induce such omis-

sion. Both conditions must concur in order to excuse the want of tender under subdivision 3 of section 1511. (*Stanford v. Savings and Loan Soc.*, 80 Fed. 54). Nor was it a "refusal to accept performance made before an offer thereof." In *Hanson v. Slaven*, 98 Cal. 377, [33 Pac. 266], it is said that "the authorities all agree that in order to constitute an implied waiver of an offer or tender, the refusal must be explicit and positive." (See, also, *Herzog v. Purdy*, 119 Cal. 99, [51 Pac. 27].) The mere assertion, unaccompanied by any other act, of a lien greater in amount than that to which the lienor is entitled, will not dispense with the necessity of a tender. (*Scarfe v. Morgan*, 4 Mees. & W. 270; *Searight v. Calbraith*, 4 Dall. 325, Fed. Cas. No. 12,585; *Hoyt v. Sprague*, 61 Barb. 497; *Lamar v. Sheppard*, 84 Ga. 561, [10 S. E. 1984]; *Loewenberg v. Arkansas and L. Ry. Co.*, 56 Ark. 439, [19 S. W. 1051].) The same considerations apply with equal force to the allegation that the defendant claims the right to apply the proceeds of the sale of the personal property and of the collection of the Robinson note to the payment of the unsecured portion of its demand. It is not alleged that this claim was ever made to plaintiff or any one representing the estate, or that it tended to induce failure to make offer of performance.

If the complaint can be regarded as setting forth a cause of action for damages by reason of the conversion of the shares of stock sold by the defendant to Mills, it is plain that said cause of action is barred by section 338, subdivision 3 of the Code of Civil Procedure. This is one of the points made by the demurrer. The complaint alleges that the unauthorized transfer and delivery to Mills took place on or about the first day of April, 1898. It further alleges that the value of the shares so transferred was in excess of the amount of the secured debt. Immediately upon the transfer there arose a cause of action for such excess. The complaint in question was not filed until March 31, 1902, almost four years after the transfer of the stock. Subdivision 3 of section 338, above referred to, is applicable to all cases "of unlawful taking or detaining of personal property," whatever the form of action. (*Lowe v. Ozmun*, 137 Cal. 257, [70 Pac. 87].) It makes no difference that the plaintiff seeks an accounting to determine the value of the stock so transferred. In so far as this may be regarded

as an action to recover the value of such property, the gist of the action is the wrongful conversion. The accounting, if it be a proper case for an accounting at all, is merely incidental to the main purpose of the action. The nature of the right sued upon and not the form of the action nor the relief demanded, determines the applicability of the statute of limitations under our code. (*Lord v. Morris*, 18 Cal. 482; *Miller & Lux v. Batz*, 131 Cal. 402, [63 Pac. 680]; *Banks v. Stockton*, 149 Cal. 599, [87 Pac. 83].) And it is immaterial whether equitable or legal relief is sought. (*Williams v. Southern Pacific Co.*, 150 Cal. 624, [89 Pac. 599].)

We are satisfied that this is not an action to recover money or other property deposited with a bank, within the meaning of section 348 of the Code of Civil Procedure. (See Civ. Code. secs. 1318 et seq.)

It is argued by the appellant that even if there be no right of redemption and no cause of action for damages for the conversion of the stock, the complaint shows facts entitling the plaintiff to a money judgment for the amount received by the defendant as the proceeds of the pledged property and retained by it in excess of the amount of the secured claim. No doubt, as above suggested, the pledgor whose property has been unlawfully disposed of by the pledgee may ratify the transfer and demand the application of the proceeds on account of his debt. He may waive the tort and sue in assumpsit. So, here, the plaintiff is not bound to treat the sale to Mills as invalid, but may recognize and adopt such sale and the application of the proceeds made thereon. If she does so recognize it, the amount realized on such sale, together with the other sums received by the bank, would be more than sufficient to pay the entire secured debt, even if that debt included the Staacke note. We need not here decide whether plaintiff's right to receive the surplus over the amount of the secured claim, and the defendant's claim for amounts not secured, are cross-demands which, under the provisions of section 440 of the Code of Civil Procedure are to be "deemed compensated, so far as they equal each other." (See *Ainsworth v. Bank of California*, 119 Cal. 470, [63 Am. St. Rep. 135, 51 Pac. 952].) If they are, the total amount received by the defendant was not sufficient to pay its entire claim, and no balance is shown to be due the estate. But,

assuming that section 440 does not apply, the action to recover the amount realized by the bank in excess of its secured claim must rest upon the ratification by the estate of the act of the bank in selling the property. The allegations of the complaint in this case are entirely inconsistent with the view that the plaintiff seeks in any event to recognize the validity of the transfer to Mills and accept its fruits. Throughout she treats the transfer as an invasion of her rights and puts herself in the attitude of repudiating it. We cannot read into this pleading an election to accept the benefits and burdens of this transfer, when the plaintiff, who alone has the right of such election, has chosen to take the opposite stand. While an action for money had and received, based upon the theory just indicated, might lie, an assertion of the right upon which such action would be based is not within the purview of this complaint, or of the relief demanded. The prayer for general relief is to be read in the light of the facts alleged and those facts negative any intent to count upon the transfer to Mills as a valid disposition of the property. The plaintiff, having the right to "waive the tort," has not waived it. (See *Whilden v. Merchants' etc. Nat. Bank*, 64 Ala. 1, [38 Am. Rep. 1]; *Chambers v. Lewis*, 10 Abb. Pr. 206, 11 Abb. Pr. 210.) We do not hold that the plaintiff has, by bringing this action, made such an election of remedies as will bar her from proceeding against the bank for the surplus proceeds of the security. For the purposes of this case it is enough to say that she is not here so proceeding.

It is argued that the complaint should be sustained as a bill in equity for an accounting of all of the transactions of the bank with reference to the security. But the accounting sought, if a case for an accounting is made, would be only incidental to the main relief sought, which is either a redemption of the property sold, or a recovery of its value. Where there can be no relief upon the main ground, the bill will not be retained for the mere purpose of having an accounting which can lead to no useful purpose. (*Jewett v. Bowman*, 29 N. J. Eq. 175.)

For these reasons we think the demurrer was properly sustained. The order sustaining the demurrer directed a dismissal of the action. The appeal is on the judgment-roll without a bill of exceptions. While it may be an abuse of discre-

tion to sustain a demurrer without leave to amend, where a cause of action is stated, and the demurrer is directed to matters of form only (*Schaake v. Eagle Automatic Can Co.*, 135 Cal. 472, [63 Pac. 1025, 67 Pac. 759]), no such abuse can, on a record like the one before us, be said to be shown where the facts alleged fail to disclose any right in the plaintiff. The bar of the statute of limitations is not specified in the code as a ground of demurrer (Code Civ. Proc., sec. 430), and that objection to a complaint, while required to be stated in the demurrer, must be deemed to be included within the ground of want of facts sufficient to constitute a cause of action. The demurrer in this case having been properly sustained on the general ground, it was, at least in the absence of a showing that leave to amend was requested, not error to enter judgment of dismissal without granting such leave.

The judgment is affirmed.

Angellotti, J., Shaw, J., Lorigan, J., and Henshaw, J., concurred.

[Sac. No. 1457. In Bank.—March 16, 1908.]

ARTHUR M. NOBLE, Administrator of the Estate of Deborah H. Lee, Deceased, Respondent, v. D. A. LEARNED, Executor of the Will of Gennis Learned, Deceased, Appellant, and SAN JOAQUIN VALLEY BUILDING AND LOAN ASSOCIATION, Co-Defendant.

ACTION BY ADMINISTRATOR TO CANCEL STOCK—DELIVERY OF INDORSED SHARES AFTER DEATH BY ORDER OF INTESTATE—GIFT CAUSA MORTIS—TRUST.—In an action by an administrator to cancel shares of stock in defendant corporation, which were indorsed, assigned by the intestate, in the name of the deceased wife of appellant, and delivered to the latter in her lifetime, by order of such intestate, after her death, by a third person who held the same for the intestate,—*held*, that the transaction did not constitute a gift *causa mortis*, and the only question is whether the evidence establishes a trust in favor of such wife sufficient to overcome a finding to the contrary.

ID.—CREATION OF TRUST IN PERSONAL PROPERTY—PAROL EVIDENCE.—A valid trust in personal property may be created by parol, if the evidence shows an intention to create a trust, and shows the subject, purpose, and beneficiary of the trust. It was possible for the intestate while retaining the legal title to the shares of stock to create a trust therein in favor of the beneficiary, by a declaration that she held the shares in trust for her benefit.

ID.—RESERVATION OF POWER OF REVOCATION—POSTPONEMENT OF ENJOYMENT.—The reservation of a partial or total power of revocation, is not inconsistent with the establishment of a trust; nor is it an objection that the right of enjoyment by the beneficiary is postponed, provided an immediate interest is given, subject to such postponement.

ID.—SUFFICIENCY OF EVIDENCE—SUPPORT OF FINDING AGAINST CREATION OF TRUST.—*Held*, that while there may be sufficient evidence to have justified a finding that the intestate so dealt with the shares as to show an intent to immediately vest the shares in the beneficiary named which should remain at her death; yet there was sufficient evidence to sustain the finding that no trust was created. [Beatty, C. J., dissenting.]

ID.—QUESTION OF FACT—PROVINCE OF TRIAL COURT.—In the case of a trust in personal property, it is for the trial court to determine as a question of fact whether the words and acts of the alleged trustor indicated with reasonable certainty an intention to create a trust, and the subject, purpose, and beneficiary of the trust; and if there is any evidence consistent with its finding that a trust was not created, the finding of the lower court must stand.

ID.—EVIDENCE CONSISTENT WITH FINDING—CONTROL OF PROPERTY BY TRUSTOR FOR LIFE.—Evidence tending to show that the intestate during her life did not intend to put the property out of her control, and wished to be assured that she could have the use and control of the whole or any part thereof as long as she lived, and that she told the third party who held the shares to keep the certificates for her, is consistent with the finding that no trust was created, and would justify the inference that she was not transferring any present interest in the shares, but was merely endeavoring to arrange a disposition of them to take effect at death.

ID.—INEFFECTUAL GIFT—INEFFECTUAL WILL—TRUST NOT CREATED.—An ineffectual attempt to make a gift does not create a trust, and equity will not perfect an imperfect gift by establishing a trust when none was in contemplation, nor can a trust be created by an ineffectual attempt at a testamentary disposition of property in the absence of a will duly attested, when the full control of the property was maintained during life, without intent to vest any interest therein prior to death.

ID.—CASE IN EQUITY—TRIAL BY COURT.—An action for the cancellation of shares of stock held by the executor of the deceased wife, as part of her estate, and to compel the defendant corporation to issue

new shares in lieu thereof, is a case in equity, which was properly tried by the court; and the appellant was not entitled to demand a trial thereof by jury.

APPEAL from a judgment of the Superior Court of San Joaquin County. F. H. Smith, Judge.

The facts are stated in the opinion of the court.

A. H. Carpenter, J. J. Burt, and D. E. Learned, for Appellant.

O. G. Hopkins, *Amicus Curiae*, for Appellant.

Plummer & Dunlap, Woods & Levinsky, A. L. Levinsky, and Sheldon G. Kellogg, for Respondent.

SLOSS, J.—In October, 1902, Deborah H. Lee was the owner of forty shares of the stock of the San Joaquin Valley Building and Loan Association. She died in March, 1903, and the certificate representing said shares came into the possession of Gennis H. Learned, who surrendered it to the association, receiving in exchange therefor a certificate for thirty-nine shares of stock and one hundred dollars in cash, the value of the remaining share.

This action was brought to establish the ownership of Deborah H. Lee in said stock. The specific relief asked was the cancellation of the certificate for thirty-nine shares, the issuance by the association of a new certificate for thirty-nine shares of stock, or the recovery of judgment for the value of the shares if such certificate could not be obtained, and the recovery of one hundred dollars.

The plaintiff, administrator of the estate of Deborah H. Lee, had judgment and the defendant D. A. Learned, sued as executor of the will of Gennis H. Learned, appeals. The main question involved is whether certain transactions had between Deborah H. Lee and A. M. Noble vested in Gennis H. Learned any legal or beneficial interest in said forty shares of stock. The facts upon which the controversy arose are substantially similar to those before this court in *Noble v. Garden*, 146 Cal. 225, [79 Pac. 883]. The subject-matter of that action consisted of twenty-nine shares of the stock of

the San Joaquin Valley Building and Loan Association. The certificate evidencing those shares and the certificate evidencing the forty here in controversy were delivered by Mrs. Lee to Noble under circumstances detailed in the opinion in *Noble v. Garden*. The defendant in that action, Clara L. T. Garden, claimed title to the shares by virtue of an alleged gift *causa mortis*. Upon appeal from a judgment in her favor this court held that the evidence was insufficient to establish such gift. The case of the appellant here, so far as this point is concerned, is no stronger, and for the reasons stated in *Noble v. Garden* it must be held that there was no valid gift of the shares to Gennis H. Learned.

But, conceding this, the appellant contends that the transaction may be upheld as a valid trust of the shares for the benefit of Mrs. Learned and that the decision in *Noble v. Garden* is not authority against the position that such trust was here created. The answer of the appellant Learned set up as a separate defense the creation of a trust in the shares, and an execution of the trust by a delivery of the certificate to Mrs. Learned. The finding of the court was that Mrs. Lee did not declare or create any trust in said stock or said certificate. Assuming that the existence of a trust was not involved or determined in *Noble v. Garden*, we must consider whether upon the facts in evidence the finding of the court against the creation of a trust was sustained by the evidence.

The principal testimony regarding the transaction was that of Noble, the plaintiff himself. He testified that about October, 1902, Mrs. Lee had a consultation with him relative to the investment of some sixteen thousand dollars owned by her. She asked his opinion as to the best method of investing this money or putting it in such a way that she could derive some income from it and "if she could dispose of it so as while she lived have the income from it, and if she should get well—she was sick at the time—she might want to use it all. If anything would happen to her she wanted the money placed in such a way it would go to those she wanted to designate." Noble told her that she could buy some Building and Loan stock which would pay her a definite rate of interest, payable semi-annually, and if she wanted to use the principal at any time that would be available also. She said "she wanted the money put where she could have the income from it and

use any part of the principal in case she needed it at any time; that she was sick, and that was the only money she had, and she did not want to put it out of her control, and she might want to use it, might want to use it all or part, she could not tell; . . . She was very particular about her control over the property; she did not want to lose control. She wanted me to tell—to assure her that she could have the use and control of the whole or any part of this money as long as she lived.” In pursuance of that conversation nineteen certificates of the stock of that corporation were issued to Mrs. Deborah H. Lee for different numbers of shares. Upon the same day Mrs. Lee signed upon the back of each of these certificates an indorsement purporting to transfer and assign the shares evidenced by the respective certificates to different persons. Certificate No. 465 for forty shares was so indorsed with an assignment running to Gennis H. Learned. Two or three days later Mrs. Lee sent for Noble and delivered the pass-books and certificates to him. She then said that “If she did not get well and anything happened to her to notify the people to whom these certificates have been assigned, and send for them and deliver them to them. She said she would use more or less of it, and what was left at the time of her death was to be given to the people mentioned by her.” Subsequently the certificates were handed to Mrs. Lee, and two of them, one for one share and one for ten shares, were canceled at her request and their value paid to her. After the cancellation of the last certificate the remainder of the certificates were returned to Noble, Mrs. Lee telling him “to take and keep them the same as I have done before—to keep them for her.” “She said keep them in your safe; . . . I never had any other conversation with Mrs. Lee in relation to the keeping of the stock, and no other directions were given.”

Mrs Lee died on the twelfth day of March, 1903, whereupon Noble sent for Mrs. Learned and delivered to her the certificate which had been indorsed with an assignment to her. Mrs. Learned surrendered the certificate, and, as has been stated, took in exchange a new certificate for thirty-nine shares and one hundred dollars in cash.

On behalf of the defendant testimony was offered to the effect that prior to the transaction between Mrs. Lee and No-

ble, Mrs. Lee had stated that she was under great obligations to her sister Mrs. Learned, and intended to give her more than any one else, and that she wanted Mrs. Learned to be able to stop working so hard. There was other testimony regarding declarations by Mrs. Lee made before the delivery of the certificates to Noble. It is not necessary to state particularly what these declarations were. It is sufficient to say that, while they tend to show that it was Mrs. Lee's desire that the shares of stock remaining at her death should be delivered to the parties named in the respective indorsements, and particularly to Mrs. Learned, there is nothing in them that conflicts with Noble's statement that Mrs. Lee reserved the power to recall and use all the certificates.

That a valid trust in personal property may be created by parol is not questioned. (Civ. Code, sec. 1052; *Hellman v McWilliams*, 70 Cal. 449, [11 Pac. 659].) A trust, whether of real or personal property, is created "as to the trustor and beneficiary by any words or acts of the trustor indicating with reasonable certainty:

"1. An intention on the part of the trustor to create a trust; and,

"2. The subject, purpose and beneficiary of the trust."
(Civil Code, sec. 2221.)

Did the evidence in this case show the concurrence of these elements so clearly as to require the court to find that a trust had been created by the plaintiff's intestate? In this connection it may be remarked that the appellant himself does not point out with "reasonable certainty" the precise trust relied upon. Was the subject of the alleged trust the shares or merely the certificate representing those shares? Who was the trustee, Mrs. Lee herself or Noble? The contention appears to be that Noble was constituted a trustee of the shares or the certificates for the benefit of Mrs. Lee during her life, and of the parties named in the various indorsements, after her death. By the creation of an express voluntary trust for the benefit of third persons, the title or estate in the property which is the subject of the trust, so far as may be necessary for carrying out the purposes of the trust, is vested in the trustee. This is implied in the very nature of the term "trust." (28 Am. & Eng. Ency. of Law, 2d ed., p. 858; Civ. Code, secs. 863, 2250.) It is plain, however, that the trans-

actions above recited did not operate to convey to Noble any title whatever to the forty shares or to the certificate. The written assignment of the shares, if operative at all, could be effective only to transfer title to the assignee, Mrs. Learned. Nor did any ownership in the certificate ever become vested in Noble. He was given only the custody of the paper, and the title to it, if it passed from Mrs. Lee at all, passed, not to Noble, but to Mrs. Learned. It follows that the transaction cannot be given the effect claimed,—i. e. of making Noble a trustee.

It is possible, however, for one who owns property, to so deal with it, while retaining the legal title, as to make himself a trustee for the benefit of another. (*Estate of Webb*, 49 Cal. 541.) "It is not necessary that this be done in express terms, but in the absence of statutory requirements any words or acts are sufficient which clearly denote the intention to relinquish his beneficial interest in the property *in præsenti* and to hold it for the benefit of another." (26 Am. & Eng. Ency. of Law, 2d ed., p. 898; *Lynch v. Rooney*, 112 Cal. 279, [44 Pac. 565].) If there is any trust here, it must have been created in this manner,—that is, by means of a declaration by Mrs. Lee that she held the shares for the benefit of Mrs. Learned, and constituted herself a trustee for the latter. It may, for the purposes of this case, be conceded that the evidence was sufficient to have justified a finding that Mrs. Lee so dealt with the shares as to show an intent to immediately vest in the parties to whom Noble was to deliver the shares the beneficial interest in such of the shares as might remain at her death. The reservation of a partial or total power of revocation is not inconsistent with the establishment of a trust. (*Hellman v. McWilliams*, 70 Cal. 449, [11 Pac. 659]; *Booth v. Oakland Bank of Savings*, 122 Cal. 19, [54 Pac. 370], Civ. Code, sec. 2280.) Nor is it an objection that the beneficiary's right of enjoyment is postponed, provided that an immediate interest, subject to such postponement, is given. (*Nichols v. Emery*, 109 Cal. 323, [58 Am. St. Rep. 43, 41 Pac. 1089].)

But, in every such case, it is for the trial court to determine, as a question of fact, whether the words and acts of the alleged trustor indicated with reasonable certainty an intention to create a trust, and the subject, purpose, and beneficiary of the trust. An ineffectual attempt to make a gift

does not create a trust, and equity will not perfect an imperfect gift by establishing a trust where none was in contemplation. (*Martin v. Funk*, 75 N. Y. 134, [31 Am. Rep. 446]; *Stevenson v. Earl*, 65 N. J. Eq. 721, [103 Am. St. Rep. 790, 55 Atl. 1091]; *Clay v. Layton*, 143 Mich. 317, [96 N. W. 458].) The evidence here is certainly consistent with the view that Mrs. Lee did not intend to vest a present interest in the parties named in the assignments. In the testimony of Noble we find the declarations by Mrs. Lee that she did not want to put the property out of her control; that she wanted to be assured that she could have the use or control of the whole or any part of this money as long as she lived. Furthermore, Noble testified that Mrs. Lee told him to keep the certificates "for her." The trial court had the right to accept Noble's testimony. Taking it all together, it justified the inference that, while Mrs. Lee undoubtedly intended and desired that any of the certificates not parted with in her lifetime should go to the parties designated, she was not transferring any present interest in the shares, but was merely endeavoring to arrange a disposition of them which should take effect upon her death. Such disposition, being in effect testamentary, could not be made effective except by a will executed in accordance with the statutory requirements governing the making of wills. (*Noble v. Garden*, 146 Cal. 225, [79 Pac. 883].) The intent to create a trust is a requisite to its creation, and the finding that no trust was created cannot be disturbed on appeal if there is any evidence from which the court might conclude that this intent did not exist, or was not shown "with reasonable certainty." The appellant places great reliance upon *Hellman v. McWilliams*, 70 Cal. 449, [11 Pac. 659]; and *Booth v. Oakland Bank*, 122 Cal. 19, [54 Pac. 370]. In *Hellman v. McWilliams* the finding of the trial court was in favor of the trust and this finding was held to be sustained by the evidence. There, as here, every presumption was in support of the finding and it could not be disturbed if it was based upon any substantial evidence. In the Booth case the action was brought by the parties relying upon the alleged trust, and the appeal was from a judgment entered upon an order of nonsuit and from an order denying a new trial. Upon a motion for a nonsuit the testimony offered is to be given the strongest possible interpretation in favor of the plaintiff's

case. If the facts there in evidence, under any possible view, were consistent with the existence of a trust, the nonsuit should not have been granted. Here, however, as has been stated, the situation is just the opposite. If there is any evidence consistent with the conclusion that a trust was not created, the finding of the lower court must stand. It cannot be doubted that there is such evidence here.

There is no force in the point that the court below erred in denying the appellant a jury trial. The action was for the cancellation of a certificate issued to Mrs. Learned and for the issuance of a new one to plaintiff. The relief sought was equitable and the defendant was not entitled to a jury trial. (*Ashton v. Heydenfeldt*, 124 Cal. 14, [56 Pac. 624]; *Ashton v. Heggerty*, 130 Cal. 516, [62 Pac. 934].)

No other points are made by the appellant.

The judgment is affirmed.

Angellotti, J., Shaw, J., Lorigan, J., and Henshaw, J., concurred.

BEATTY, C. J., dissenting.—I dissent from the judgment of the court in this case upon the ground that the contention of appellant that a valid trust in favor of his intestate was created by Mrs. Lee is fully sustained by the decisions of this court in *Booth v. Oakland Bank*, 122 Cal. 19, [54 Pac. 370]; and *Hellman v. McWilliams*, 70 Cal. 450, [11 Pac. 659]. Those cases cannot be distinguished from this upon the ground stated in the opinion of the court. It makes no difference that in one the court merely affirmed a finding of the superior court, and in the other reversed a judgment of nonsuit. In each case it became necessary to decide what evidence would, *if true*, establish an oral trust of personal property. In this case the evidence of the only witness as to Mrs. Lee's declarations was in substance the same as that which, assuming its truth, was held sufficient in the cases cited, and that witness was the plaintiff in the action whose testimony could not be deemed untrue in order to find the fact in his favor. A finding in favor of the plaintiff in conflict with his own testimony, and in the absence of any other testimony cannot, in my opinion, be upheld.

[Sac. No. 1576. In Bank.—March 16, 1908.]

ALICE E. HINER, Respondent, v. J. E. HINER, Appellant.

HUSBAND AND WIFE—NON-RESIDENT WIFE MAY MAINTAIN ACTION FOR MAINTENANCE.—Under section 137 of the Civil Code, a non-resident wife may maintain an action in this state against a resident husband for permanent support and maintenance when she has cause for a divorce against him under section 92 of that code.

APPEAL from an order of the Superior Court of Sonoma County granting an allowance to a wife for alimony in an action for maintenance. Emmet Seawell, Judge.

The facts are stated in the opinion of the court.

J. M. Thompson, for Appellant.

J. W. Oates, for Respondent.

LORIGAN, J.—The plaintiff, who is the wife of defendant, brought this action against him in the county of Sonoma to obtain a judgment for permanent support of herself and minor children under section 137 of the Civil Code without asking for a divorce.

The complaint filed on February 9, 1906, alleged the marriage of the parties in 1902; set forth facts constituting desertion of plaintiff by defendant under the laws of this state; alleged that such desertion of plaintiff took place in the state of Washington in October, 1902; that plaintiff is a resident of said state of Washington and that defendant, since shortly after October, 1902, has been and now is a *bona fide* resident of Sonoma County, this state, and by further apt allegations set forth the poverty of plaintiff and the failure of the defendant to support her and their minor children since the date of his desertion.

The defendant demurred to the complaint, challenging the sufficiency of the facts stated to constitute a cause of action and questioning the jurisdiction of the court over the subject-matter of the controversy. Before the demurrer was disposed of plaintiff moved the court for alimony *pendente lite* and for costs and counsel fees, which, though resisted by defendant, the court granted.

This appeal is taken by defendant from such order of allowance and the only question presented for consideration is: Can a non-resident wife maintain an action in this state against a resident husband for permanent support and maintenance when she has cause for a divorce against him under the law of this state?

This is the first time this particular question has arisen in this court and it is to be solved from an examination of the various provisions of the code bearing upon the inquiry and these consist of sections 92, 128 and 137 of our Civil Code.

Section 92 declares the several causes for which a divorce may be granted in this state and enumerates "willful desertion" as one of them. Section 128 provides that "a divorce must not be granted unless the plaintiff has been a resident of this state for one year and of the county in which the action is brought three months next preceding the commencement of the action." That portion of section 137 pertinent to the question here declares that "when the wife has any cause of action for divorce, as provided in section 92 of this code, she may, without applying for a divorce, maintain in the superior court an action against him for permanent support and maintenance of herself, or of herself and children."

The principal point to be considered upon this appeal is as to the meaning of the language used in this latter section. To simplify matters it may be stated that no question is made upon this appeal but that the complaint states one of the causes for divorce—willful desertion—mentioned in section 92.

The claim of counsel for appellant is that plaintiff could only maintain an action for permanent support under the provisions of section 137 if she had a "cause of action for divorce" against defendant, and that to constitute a cause of action for divorce in this state there must not only exist in her favor one of the "causes for divorce" mentioned in section 92, but she must also have been a resident of the state for the period required by section 128; that sections 92 and 128 must be considered together for the purpose of determining whether plaintiff has a cause of action for divorce or not.

We make no question of the accuracy of appellant's claim that residence is an essential element to a cause of action

where a divorce itself is sought, because the law so declares, but we cannot agree with his claim that residence was intended by the legislature as an essential element in the "cause of action" mentioned in section 137. We perceive no impelling reason which calls upon us, in determining what is meant by the cause of action referred to in section 137, to consider in connection with section 92, which is referred to in it, also section 128, which is not. There is certainly no rule of construction that requires us to do so.

Section 128 deals exclusively with divorce, and the object of the legislature in requiring a residence of one year in this state before a divorce can be obtained is quite apparent. It was intended by requiring a residence of a permanent character, to prevent persons who could not obtain divorce in the state or country of their real residence, from establishing temporary residence here for the purpose of doing so. The policy of the law is against allowing divorces and they are only allowed in this state in the enumerated cases in section 92. The spirit of section 128 is to prohibit them entirely from being granted in this state except to *bona fide* residents thereof. That is its only purpose. The section was never intended by the legislature to be invoked in the construction of section 137 so as to defeat the right of the wife to enforce against the husband resident here, the marital obligation of supporting her and their minor children which that section conferred. The policy of the law, as illustrated by the enactment of section 137, is to afford the wife, when cause for a divorce exists under section 92, the right to enforce support from her husband, which springs from the marital *status*, without praying for or requiring a total dissolution of such *status*. Public policy defends the wisdom of a provision of law requiring that the plaintiff shall be a *bona fide* resident of the state, the jurisdiction of whose courts is invoked to obtain a divorce. Its purpose is to prevent a fraud upon the law of the state by non-residents and is in aid of restricting the dissolution of the marriage *status* except at the suit of a resident of this state. There is, however, no possible consideration of public policy which could be suggested in support of precluding a non-resident wife, or a wife resident here for less than a year, from invoking the aid of our courts to compel support from her husband

who is a *bona fide* resident of the state. The policy of the present age, following an instinct of humanity and justice, and crystallizing it into legislative enactment, has been to afford facilities to the wife to compel the delinquent husband to discharge his marital duty of support without seeking a divorce, and no one has ever deprecated the justice or wisdom of the provision except the delinquent husband himself. Particularly in this country has the doctrine of our courts and the legislation of the states furthered that right. Under the rule prevailing in the English system a court of equity could not decree a specific performance of the marital obligation on the part of the delinquent husband by requiring him to furnish his wife separate maintenance; that the only remedy was in a court of law by action against the husband in favor of any one who was considerate enough to supply her with the necessities of life; that the jurisdiction of awarding alimony to the wife rested with the spiritual courts, could only be granted in those courts, and then only as an incident to a decree of divorce.

A more reasonable doctrine early obtained in most of the American courts and it was held that under its general powers, a court of equity, was authorized in the case of abandonment of the wife by the husband, to award her, at her own suit, a decree for separate maintenance against her husband without any application for a divorce. It was so held in this state before there was any legislation upon the subject. (*Galland v. Galland*, 38 Cal. 265.) Subsequently it was provided by section 137, and so stood before the amendment of 1895 which is now under consideration, that the wife might maintain an action for separate maintenance without applying for a divorce "when the husband willfully deserts the wife." This original section extended such right only in cases of willful desertion. In 1895 the present section was passed which extended the right not only where there had been willful desertion, but to all cases where the wife has any cause of action for divorce as provided in section 92 of this code. The purpose of the amendment was to enlarge the right of action in favor of the wife. It is remedial in its character and the rule is that remedial statutes are to be liberally construed. Now, considering the remedy which the legislature by the section intended to afford to the wife,

which was the right of separate maintenance without the necessity of suing for divorce, we perceive no reason why the language of the section conferring it should be construed to mean that before she could invoke this particular remedy she should, through residence for the statutory period, be able to invoke the remedy for divorce, which she did not desire, and which the section declares she need not apply for. What the legislature intended was to accord the wife the right to compel the husband to discharge his marital obligation of support, and while it provided that this could be enforced without asking for a divorce when the "wife has any cause of action for divorce as provided in section 92 of this code" the cause of action referred to consisted solely of the existence of one of the "causes for divorce" mentioned in section 92 as affording a basis for divorce. There is no rule that requires that the term "cause of action" shall be given a strict technical construction. As is said in Cyc., vol. I, p. 643: "As with most legal terms it often becomes necessary, acting upon the well-settled rules of construction, to depart from the technical meaning and use of the words 'cause of action' when contained in statutes, . . . in order to carry out the intention of the legislature. . . ." Now applying this rule to the further consideration of this question. Section 92 declares what shall constitute "causes for divorce," and when the legislature in section 137 authorized an action by the wife for separate maintenance where she had "a cause of action for divorce as provided in section 92," the cause of action referred to was intended to mean the existence of any of the causes for divorce which were specified in the latter section; that while for the purpose of constituting a cause of action where dissolution of the marriage relation was sought, residence according to section 128 was essential, still, for the purpose of sustaining an action for maintenance without divorce, the existence of "cause for divorce" as provided in section 92 constitutes the cause of action, and was all that was necessary or required. We think this is a reasonable and just construction to be given to section 137, and is in accord with the language used in it. It was undoubtedly a question for the legislature to declare under what conditions it should accord the right to a married woman to maintain an action for separate maintenance. If it had intended that she should not

have that right unless a resident of the state for a year, it would have said so plainly. It could have declared it by referring to section 128 as well as section 92, in enacting section 137. Or, if it was intended that residence should have any application to the right of action referred to in section 137, it could have amended section 128 so as to declare that a divorce or judgment for permanent support shall not be granted unless plaintiff has resided in the state a year. The fact that it neither referred to that section nor amended it, but referred solely and specifically to section 92, is persuasive evidence that the right of a wife to sue for support was to be measured alone by the existence of a cause for divorce, as provided in section 92 referred to, and is the cause of action meant, and that section 128 was not intended to have any application.

Aside from this, effect must be given to all the language used in section 137. It may not be assumed that any words employed in it were used idly. And if it was not intended by referring to section 92 to declare that the existence of the "cause for divorce" provided therein should constitute the cause of action for separate maintenance, then the reference to that section was idle. If it had been intended by the legislature that residence for the required period should enter as an element in the cause of action for separate support which it was conferring under section 137, it would have been entirely unnecessary to refer to section 92 at all. If that was the intention, it would have been effectually disclosed by simply providing that "when the wife has any cause of action for divorce . . . she may maintain" such action for support. No reference to section 92 would then have any place or purpose, because there are no other causes for divorce except as stated in that section, and to have referred to causes for divorce generally would have accomplished every purpose, and have left no room for doubt but that residence for the statutory period would have been essential as an element to the cause of action mentioned in section 137.

On the other hand, by referring to section 92 and authorizing suit by the wife for permanent support without divorce when she has a cause of action for divorce as therein provided, the only effect and purpose of the reference to such section must have been to declare that a cause of action for main-

tenance is complete when any cause or ground for divorce exists in her favor, and that her right to sue is to be measured alone by the existence of any such cause for divorce, and that residence under section 128 was not intended to enter as an essential element to its maintenance. And there is every just reason why this should have been the intention of the legislature and that such a construction should be put on the language of the section.

Section 128 has reference solely to the dissolution of the marriage; section 137 solely to conferring a right to secure support without applying for a dissolution. The one was intended to prevent a fraudulent use of the courts of this state by temporary residents to obtain the divorces here which they could not obtain in the states where they properly resided; the other in aid of the right of a wife to compel the husband to fulfill his marital obligation to support her and his minor children. While restricting divorces is a matter of public policy, enforcing the obligations of the husband to support his family is a matter of justice and duty to be exercised as well in favor of a non-resident as a resident wife, against a husband who is *bona fide* a resident of this state. It was undoubtedly in this spirit that the legislature declared that this obligation might be enforced and that the right to do so should exist when the wife had a cause of action as declared in section 92. It is not consonant with justice, nor is it warranted by the terms of section 137, to say that the legislature meant, in addition to the existence of a cause for divorce under section 92, that the plaintiff should also be a resident for a year before she would be entitled to maintain an action for her support. Happily it is not the law for, while section 128 is intended to apply solely to actions where a divorce itself is sought, and to prevent this state from being made a resort in which to obtain a divorce by imposition upon our courts under a fraudulent claim of residence, it was not intended to apply under section 137 as a basis for preventing a non-resident deserted wife having a cause of action under section 92 of the code from obtaining the benefit of its provisions.

We are cited by counsel for appellant to certain decisions from Florida which he contends sustain the views he urges here. They do to some extent, but the statutes of Florida are

so different from our code provision 137 that these cases do not aid us in the construction of our section of the code.

The order appealed from is affirmed.

Henshaw, J., Angellotti, J., Sloss, J., and Shaw, J., concurred.

[Crim. No. 1426. In Bank.—March 16, 1908.]

THE PEOPLE, Respondent, v. THOMAS J. HART, Appellant.

CRIMINAL LAW — TESTIMONY ON PRELIMINARY EXAMINATION — CROSS-EXAMINATION.—On a trial for grand larceny, proof of the fact that a witness for the prosecution had been sworn on the preliminary examination of the defendant is sufficient to raise the implication that he had testified thereon; and an objection to questions asked such witness on cross-examination in reference to his testimony there given, on the ground that they were "immaterial, irrelevant and incompetent," is insufficient to raise the special points that no sufficient predicate had been laid of the fact that the witness had testified on the preliminary examination, or that there should have been exhibited to the witness his testimony given thereon.

ID.—PRELIMINARY IMPEACHING QUESTIONS—TESTING CREDIBILITY, MEMORY, AND FAIRNESS OF WITNESS.—On such a trial, after a witness for the prosecution had testified to a certain conversation between the complaining witness and the defendant, questions asked him on his cross-examination, as to whether he had made such statements on the preliminary examination, and why he had not done so, and whether he had then told all he knew about the case, were merely preliminary for the purposes of impeachment, and should have been allowed, although a transcript of the witness's testimony was not first shown him. Such questions were also admissible as testing the credibility, memory, and fairness of the witness.

APPEAL from a judgment of the Superior Court of Yuba County and from an order refusing a new trial. Eugene P. McDaniel, Judge.

The facts are stated in the opinion of the court.

J. C. Thomas, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, for Respondent.

LORIGAN, J.—The justices of the district court of appeal for the third appellate district having given their respective opinions in this cause and being unable to agree in a judgment therein, the matter is brought to this court for disposition.

The appellant, T. J. Hart, was jointly informed against with Evan Davis and James Flood for the crime of grand larceny. Davis, on his arraignment, pleaded guilty to the charge. What became of Flood the record does not disclose. The appellant was tried, convicted, and sentenced to four years' imprisonment in San Quentin, and from the judgment of conviction and the order denying his motion for a new trial, he appeals.

The evidence adduced at the trial of defendant Hart established that on October 7, 1906, the prosecuting witness Fred Dowane went from Wheatland to Marysville, reaching the latter city about dusk. He had with him about fifty-five dollars, consisting of two twenty-dollar pieces and some smaller gold and some silver coin. Immediately on reaching Marysville he went to Dempsey's saloon, which he had been accustomed to visit, and there met the defendant and Flood and proceeded to treat them and other persons in the bar-room. After several drinks taken there, Dowane, together with the defendant and Flood, went to the Workingman's Saloon, where they were subsequently joined by Davis, and more drinks were indulged in. Dowane had no prior acquaintance with either the defendant or Flood or Davis. It would seem, however, from the testimony of Davis that he knew defendant before he joined the party in the Workingman's Saloon that night, but to what extent they were acquainted is not disclosed. When Davis went into the saloon, as he testified, "there was no introduction; went into the saloon by myself. Hart was there and said 'There is a live one; come up and have a drink.'" Dowane did the treating at the Workingman's Saloon, and while there exhibited his money. Leaving the Workingman's Saloon, the party consisting of Dowane, the defendant, Davis, and Flood, took in other saloons and together reached Gabriel's saloon, the

last one visited by them on their round. It was after they left this saloon that Dowane was robbed, and as to the occurrence he testified: "Was alone, they all came out of the saloon at the same time. Witness was alone with these three parties. Left the saloon in the company with the men witness went there with. One of the men was then in the courtroom, the defendant. Went out the front door of the saloon, or the corner, did not know which. Defendant was one of the men witness went out with. Turned to go uptown. There were three with the witness, defendant was one. Was grabbed from behind when maybe a couple of hundred yards from the saloon. The one who grabbed witness had his hand tied up. Hart, the defendant, was on the left side of witness at the time the man with his hand tied grabbed him. Was right up to witness, that is the defendant, Hart."

Q. "Do you know whether or not right at that time he touched your person?"

A. "Well, all he could have done perhaps was kind of to take hold of my pocket like this (showing). I remember that very well."

"At that time the little fellow, Davis, was on the right side of witness. Right up close to witness. The man who had his hand wrapped was the one who grabbed witness from behind. From the time he left Dempsey's saloon and Debau's saloon, the saloon on the corner, and the one near the levee, during all of that time did not know of it, if he was in company with any one but Hart, Flood and Davis. Had made associates with no one else."

Q. "Were you traveling with any one excepting the three named?"

A. "I was not."

It appeared from Dowane's testimony that Davis took the money from his pocket. He testified on cross-examination:

Q. "The defendant never made any effort to take any money from you, did he?"

A. "Never made any effort, no."

Q. "As a matter of fact he did not take any money from you, did he?"

A. "No."

Q. "You do not know whether or not he was in counsel with or advised or connived with anybody to take any money from you, do you?"

A. "Only from observation."

Q. "What did you observe that would make you believe that?"

A. "Well, it looked to me like that, when they were keeping company together and when I was robbed, this party went away with the others."

After being robbed Dowane went to a saloon known as Wall's, where the party had previously been in making their round that night. Hart and Davis were in the saloon drinking when Dowane came in. As to what occurred after Dowane came in, the barkeeper—Hall—who had been on duty all that evening, testified: "While they, Hart and Davis, were there he (Dowane) said he had been robbed, and looked in the crowd at the bar, and pointed to Hart and said he was one of the men. He said that is one of the men, and I want a policeman, if there is any around and I want one now. . . . Hart and Davis were about ten feet off when Dowane made the remark that Hart was one of the men who robbed him. . . . Hart said he had not seen Dowane, had not been with him."

On the cross-examination of Hall by counsel for the defendant, the witness was asked these questions, after stating that he had been sworn at the preliminary examination of the defendant:

Q. "You did not make this statement on the preliminary examination, did you?"

Q. "Why did you not make this statement on the preliminary examination?"

Q. "In your testimony on the preliminary examination did you then and there tell all you knew about the case?"

To each of the foregoing questions the court sustained an objection by the district attorney upon the ground that it was "immaterial, irrelevant and incompetent."

The bartender further testified that a few minutes after Dowane made the above statement indicating Hart as one of the parties who had robbed him and that he wanted a policeman, and Hart denied that he had been with or seen Dowane that night, Hart and Davis went away together, and after they had gone the witness telephoned for the police. An officer came in not long afterwards and Hart and Davis were arrested together somewhere on the streets of the city. The

officer found on Hart \$1.60 and on Davis two twenty-dollar gold-pieces, two five-dollar gold-pieces, and some silver.

On behalf of the defense the only testimony offered was that of Davis and one witness who testified favorably to the reputation of the defendant for honesty. Davis testified that he took the money from Dowane; that there was no previous understanding with Hart or Flood, or either of them, of any character, that Dowane should be robbed; that at the time the money was taken by him from Dowane, the latter had it in his hand and was apparently about to put it in his pocket; that he (Davis) was standing by his side and grabbed him by the arm, wrenched the money out of his hand and went across the street; that he took it on the impulse of the moment and could have done so without the other two knowing anything about it; that Hart was four or five feet away when he took it and he could easily have taken it away without either knowing whether he had taken it or not; that Hart followed him after he went across the street and together they went into a saloon; that after he took the money nothing was ever said about it; nothing as to any division of it being made.

We have stated all the material evidence in the case so that the main point upon which the claim for a reversal is based may the better be understood. This is that the court erred in sustaining the objections of the prosecution to the questions asked by the defense of the barkeeper Hall as to whether he had at the preliminary examination as he then did on the trial, made the statement concerning what took place in the saloon after the robbery while Dowane, Davis, and Hart were there.

It is insisted by the People that the rulings were proper because it did not appear, 1. That the witness had testified upon any preliminary examination; 2. That the attorney for defendant had not offered to exhibit to the witness any transcript of his testimony taken at the preliminary examination, and, thirdly, that in any event the ruling was not prejudicial to the defendant.

The only claim of the People is that the defense had not laid the proper predicate or adopted the proper form to authorize the questions. But, there is clearly no merit in this claim, particularly under the general objections which were interposed. While it is insisted by the prosecution

that it was not shown that the witness had testified at the preliminary examination, this claim is not strictly true. The witness answered to a previous inquiry on that subject that he had "been sworn on the preliminary examination." While it is true that this was not proving with legal exactness that he then *testified*, still it was a statement from which it was to be implied that he had done so, and was sufficient proof of it to require upon the part of the prosecution more specific objection to the inquiries which were being made on the theory that there was such proof, than that the questions that were asked were "immaterial, irrelevant and incompetent." Proof of the fact that he had been *sworn* was sufficient to raise the implication that he had *testified* and if it was really intended under the general objection interposed by the People to the subsequent inquiries of counsel for defendant to make the special point that no sufficient predicate had been laid because it was directly proven that the witness had testified on the preliminary examination or that there should have been exhibited to the witness his testimony given at the preliminary examination, it was the duty of the district attorney to have made these specific objections in order to afford the attorney for the defendant an opportunity to obviate them and have the witness answer the questions which were pertinent and otherwise unobjectionable.

As to the further argument of the prosecution that the questions were impeaching questions and therefore that a transcript of the witness's testimony should have first been shown him, it is sufficient to say that these questions were not by way of direct impeachment. In the first place they were but preliminary in their nature, and had answers been allowed, the explanations of the witness might have been full, complete, and satisfactory. He might, for example, have said that he did so testify on preliminary examination, or he might have answered that he was not interrogated upon the subject at all. Only as he answered, and depending upon the character of his answers, would questions by way of direct impeachment have followed. As it was, in sustaining the objection to these questions, the court cut off the right of defendant's counsel to proceed along a legitimate line of cross-examination, while, in ad-

dition to this, the questions in and of themselves were pertinent, proper, and valuable cross-examination as testing the credibility, memory, and fairness of the witness. (*People v. Manasse, ante*, p. 10, [94 Pac. 92].)

No other point urged as error seems to call for specific consideration, but for the reasons above given the judgment and order are reversed and the cause remanded for a new trial.

Henshaw, J., McFarland, J., and Beatty, C. J., concurred.

[S. F. No. 4348. Department Two.—March 19, 1908.]

RICHARD BRETT, Appellant, v. S. H. FRANK & COMPANY et al., Respondents.

ACTION BY SERVANT FOR NEGLIGENCE OF MASTER—ERROR IN DENYING NONSUIT—ORDER GRANTING NEW TRIAL—REVIEW UPON APPEAL.—In an action by a servant for injuries received through the alleged negligence of his employer in not providing him a safe place for work, in which after verdict for plaintiff, the court granted a new trial on the sole ground that it erred in denying defendant's motion for nonsuit on the plaintiff's evidence, though this court is not limited in its review of the order to the ground thus assigned, it is sufficient that the order may be sustained on such ground.

ID.—EMPLOYER NOT REQUIRED TO INSURE AGAINST ACCIDENTS—ASSUMPTION OF RISK BY SERVANT.—An employer in performing his duty to provide a reasonably safe place in which the servant is to do the work assigned to him, is not required to insure a servant against accidents, or to take extraordinary cautions to prevent it; and the servant assumes the risk of all known dangers in the course of his employment, which he can avoid with ordinary care.

ID.—SHAFT-HOLE IN FLOOR OF TANNERY—KNOWLEDGE OF ADULT SERVANT—FORGETFULNESS OF PERIL—CONTRIBUTORY NEGLIGENCE.—Where the employer maintained an open shaft-hole in the floor of his tannery, which operated the elevator, the existence of which was fully known to an adult servant whose ordinary duties in wheeling sides of sole leather upon a track to the elevator enabled him to clear the hole, but in temporary forgetfulness of his peril, while plaintiff with an assistant was backing the truck to the elevator, he stepped into the shaft hole, such forgetfulness, being due to his want of ordinary care, did not raise a question of fact for the jury, but was contributory negligence, barring recovery, for which a nonsuit should have been granted.

ID.—FORGETFULNESS OF PERIL—WHEN NOT BARRING RECOVERY—EXCEPTIONAL CASES.—Preoccupation or forgetfulness of peril on the part of an employee, which does not bar recovery as matter of law, but raises a question for the jury, only applies in exceptional cases, having to do with abnormal risks and with the performance of duties under the high tension of emergency, and where the doing of one necessary thing under the stress of immediate action, does not charge him with contributory negligence because he has omitted or forgotten another.

ID.—GENERAL RULE UNAFFECTED BY EXCEPTIONS.—Such exceptional cases are in no way subversive of the long-established rule that “the law demands that one who is working in a place where he is exposed to danger shall himself exercise his faculties for his own protection, and does not permit a recovery for damages resulting from a neglect of this rule.”

APPEAL from an order of the Superior Court of the City and County of San Francisco granting a new trial. Frank H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

Stafford & Stafford, for Appellant.

Nonsuit should not be granted unless the conclusion of the plaintiff's negligence is irresistible. It should be the exception, and not the rule. (*Herbert v. Southern Pacific Co.*, 121 Cal. 227, 228, 53 Pac. 651; *Schierhold v. North Beach R. R. Co.*, 40 Cal. 447; *Van Praag v. Gale*, 107 Cal. 438, 443, 40 Pac. 555; *McKune v. Santa Clara M. & Co.*, 110 Cal. 480, 484, 42 Pac. 980; *Smith v. Occidental S. Co.*, 99 Cal. 467, 34 Pac. 84; *Ingerman v. Moore*, 90 Cal. 424, 25 Am. St. Rep. 138, 27 Pac. 306; *Orcutt v. Pacific Coast R. Co.*, 85 Cal. 291, 24 Pac. 661; *Whalen v. Arcata R. R.*, 92 Cal. 669, 28 Pac. 833; *Davies v. Oceanic S. S. Co.*, 89 Cal. 280, 26 Pac. 827; *Redington v. Pacific P. T. Co.*, 107 Cal. 317, 48 Am. St. Rep. 132, 40 Pac. 432; *Martin v. Cal. C. R.*, 94 Cal. 326, 29 Pac. 645; *Magee v. North Pac. R. R. Co.*, 78 Cal. 435, 12 Am. St. Rep. 69, 21 Pac. 114.) Temporary forgetfulness of danger raises a question of fact for the jury, and does not preclude a recovery. (*Labat on Master and Servant*, sec. 350; *Johnson v. Bruner*, 61 Pa. St. 58, 61, 62, 100 Am. Dec. 613; *Van Praag v. Gale*, 107 Cal. 538, 40 Pac. 555; *Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 126, 48 Am. St. Rep. 114, 40 Pac. 108; *Snow v. Housatonic*

R. R., 8 Allen, 441, 85 Am. Dec. 720; *Plank v. New York etc. R. R. Co.*, 60 N. Y. 607; *Austin v. Fitchburg R. Co.*, 172 Mass. 484, 52 N. E. 527; *Kane v. N. C. R. R. Co.*, 128 U. S. 95, 9 Sup. Ct. 16; *Boyle v. Construction Co.*, 47 App. Div. 311, 61 N. Y. Supp. 1043; *Basset v. Fish*, 75 N. Y. 303; *Frye v. Bath Gas Co.*, 94 Me. 17, 46 Atl. 804; *Viohl v. North Pac. Lumber Co.*, 46 Or. 297, 80 Pac. 112, and cases cited; *Wallace v. Cent. V. R.*, 138 N. Y. 302, 33 N. E. 1069.)

Chickering & Gregory, for Respondents.

The employer is not bound to insure his servants against accidents, and his duty is fulfilled when he exercises ordinary care to that end. (*Thompson v. California Construction Co.*, 148 Cal. 35, 82 Pac. 367; *Corletti v. Southern Pac. Co.*, 136 Cal. 645, 69 Pac. 422.) If the servant, with ordinary prudence, accepts the employment with the appliances furnished, it cannot be said that the master has neglected his duty. (*Rush v. Mo. Pac. R. R.*, 36 Kan. 129, 12 Pac. 582; *Kupp v. Rummell*, 199 Pa. 90, 48 Atl. 679; *Baker v. Empire Wire Co.*, 102 App. Div. 125, 92 N. Y. Supp. 355.) The plaintiff was guilty of contributory negligence, notwithstanding his inattention, due to a want of ordinary care to avoid a known danger. (*Kenna v. Cent. Pacific R. R.*, 101 Cal. 26, 35 Pac. 332; *Davis v. Cal. St. Cable Ry.*, 105 Cal. 131, 38 Pac. 647; *Martin v. Cal. Cent. Ry.*, 94 Cal. 326, 29 Pac. 645; *Dutchowski v. Handy Things Co.*, 141 Mich. 11, 104 N. W. 358, 360; *Reeve v. Colusa Gas & Electric Co.*, 151 Cal. 29, 91 Pac. 802.) The plaintiff assumed the risk of all known dangers attending his employment of which he made no complaint. (*Limberg v. Glenwood Lumber Co.*, 127 Cal. 598, 602, 60 Pac. 176; *Beeson v. Green Mt. Gold Mining Co.*, 57 Cal. 20; *Kauffman v. Maier*, 94 Cal. 269, 29 Pac. 481; *Smith v. Occidental Steamship Co.*, 99 Cal. 462, 34 Pac. 84; Labat on Master and Servant, sec. 350; *McGlynn v. Brodie*, 31 Cal. 377, 380; *Cincinnati etc. R. R. Co. v. Robertson*, 139 Fed. 519, 522, 75 C. C. A. 335; *Denver Tramway Co. v. Nesbitt*, 22 Colo. 409, 45 Pac. 406; *Wanamaker v. Burke*, 111 Pa. St. 423, 2 Atl. 500; *Wood v. Heiges*, 83 Md. 257, 34 Atl. 872, 873; *Anthony v. Leeret*, 105 N. Y. 591, 12 N. E. 561; *Gibson v. Erie R. R. Co.*, 63 N. Y. 449, 20 Am. Rep. 552; *De Forest v. Jewett*, 88 N. Y.

264; *Sweeney v. Berlin and J. Envelope Co.*, 101 N. Y. 520, 54 Am. St. Rep. 722, 5 N. E. 358; *Whatley v. Block*, 95 Ga. 15, 21 S. E. 985; *Balle v. Detroit Leather Co.*, 73 Mich. 158, 41 N. W. 216, 218; *Nealand v. Lynn & Boston R. R. Co.*, 173 Mass. 42, 53 N. E. 137; *Feely v. Pearson Cordage Co.*, 161 Mass. 426, 37 N. E. 368; *Kennedy v. Manhattan R. R.*, 145 N. Y. 288, 39 N. E. 956; *Ragon v. Toledo etc. R. R.*, 97 Mich. 265, 37 Am. St. Rep. 336, 56 N. W. 612, 614, 615; *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648.)

McFARLAND, J.—This is an action for damages. After trial and verdict for plaintiff the court granted defendants' motion for a new trial and plaintiff appeals.

The court ordered a new trial "on the ground that the motion for nonsuit should have been granted, and order denied on all other grounds." It is contended by appellant that this limits the consideration of this court to the one proposition. The question is not of consequence in this case for, upon the ground indicated, the court was correct in its ruling. However, the position of appellant in this matter is contrary to the well-settled rule. (*Kauffman v. Maier*, 94 Cal. 269, [29 Pac. 481]; *Thompson v. California Construction Co.*, 148 Cal. 35, [82 Pac. 367]; *Weisser v. Southern Pacific Co.*, 148 Cal. 426, [83 Pac. 439].)

The action was for personal injuries alleged to have been occasioned to plaintiff, an employee of defendant, through the negligence of the latter. The negligence charged consisted in maintaining, in an unguarded condition, upon the second floor of its tannery building, a hole in the floor through which passed a leather belt. The accident to plaintiff occurred by his stepping with his right leg into the unguarded hole, whereby his leg was mangled by the moving belt. The undisputed facts disclosed by the evidence at the time when plaintiff rested his case and a motion for a nonsuit was interposed are the following: Plaintiff was an adult laborer in the employ of the defendant. For seven weeks prior to the accident he was engaged in hauling sides of sole leather upon a truck from the rolling room to the drying room. The truck was loaded upon one floor, wheeled into the elevator, thus carried to the second floor—the drying room—where the truck was

wheeled out of the elevator to some convenient place in the room for the purpose of drying the hides. About nine inches to the right of the entrance to the elevator and slightly in front of that entrance was the hole, 26 by 14 inches, through which the belt from the ceiling of the second floor ran to the first floor. This belt operated the elevator. Plaintiff was perfectly familiar with the condition, knew of the existence of the hole, which was unguarded, and at the time of the accident the room was so light that every object therein could be distinguished clearly and without difficulty. Plaintiff could have seen the hole had he looked for it. On the afternoon of the accident plaintiff with an assistant, Price, was pushing a truck loaded with leather off the elevator at the second floor. Plaintiff was guiding the truck and accidentally twisted the tongue, as he says, by reason of the fact that Price leaned against it. Because of this the direction of the truck was swerved and its rear wheels struck an elevation or "rise" in the floor. To guide the truck along its proper course it became necessary to back it off this elevation, and in doing so plaintiff stepped into the open hole. Plaintiff was perfectly familiar with the conditions at the time of the accident and they had not been changed. He had passed the spot of the accident at least four or five times a day for seven weeks. He knew of the hole and that it was unguarded and had made no complaint of its condition. The truck which he was handling at the time of the accident was a light one, was easily turned, and there was a light load upon it. The hole did not interfere with his route of travel to and from the elevator but was to one side of it. He backed into it. In pulling the truck off from the "rise" he stepped back three or four steps before putting his leg into the hole. He could have stepped back into the elevator, but did not want to do so lest somebody should lower it while he was there.

To summarize, an adult employee, perfectly familiar with his work and with the conditions and environment in which he is performing it, through the act of a fellow employee, pushes the light truck which they are wheeling against an obstruction so that it is necessary to back it off. In doing this the employee takes three or four steps backward, and

without looking for or thinking of a hole, with the existence, place, and purpose of which he is perfectly familiar, steps into it and is injured.

The law, in justly requiring that an employer shall furnish reasonably safe appliances and a reasonably safe place for the performance of his work, does not make him an insurer of his employees against all accidents. It does not require the employer to provide safeguards against every possible chance of accident. Nor, having furnished a reasonably safe place, does it hold him responsible if an accident has happened which could have been avoided had the employer used extraordinary precautions to prevent it. The requirement that the place of employment shall be reasonably safe is itself always to be considered in connection with the rule of law as to the assumption by the employee of known and understood risks. But, aside from the consideration as to whether under these circumstances negligence in failing to provide a safe place for work may be imputed to the employer in this case, it is indisputable that the accident was occasioned through the negligent failure of the plaintiff himself to use ordinary prudence for his own protection. Plaintiff, perfectly familiar with the condition of the premises, inadvertently walking backward, steps into a hole which he knew was there, and which, had he looked, he could readily have seen. This inadvertence and forgetfulness is sought to be excused by appellant upon the proposition that plaintiff was so engrossed in the performance of his duties at the time of the accident that his forgetfulness was not negligence, or at least that it was for the jury to say whether it was or not. It is recognized that there are cases where preoccupation or forgetfulness on the part of the employee does not bar a recovery. These cases, from the nature of things, are exceptional. They have to do with abnormal risks and with the performance of duties under the high tension of emergency, and where in the doing of one necessary thing under the stress of immediate action an employee shall not be held guilty of contributory negligence because he has omitted or forgotten another. Thus it is said in *Labat on Master and Servant*: "This doctrine may be referred to the general principle that the failure of an employee to perform a duty will not constitute

contributory negligence where such failure results from the necessary observance of a duty of equal importance and equally binding upon him, the neglected duty in this instance being that of keeping a vigilant lookout." But these exceptional cases are in no way subversive of the long-established rule that "the law demands that one who is working in a place where he is exposed to danger shall himself exercise his faculties for his own protection, and does not permit a recovery for damages resulting from a neglect of this rule." (*Kenna v. Central Pacific R. R.*, 101 Cal. 26, [35 Pac. 332].) In *Davis v. California Street Cable Co.*, 105 Cal. 131, [38 Pac. 647], defendant had placed an iron rail to be used in the construction of its street-railway track in front of the house in which plaintiff lived. It had remained there about four weeks. An alarm of fire having been sounded in the night-time, plaintiff came out of her house and started across the sidewalk to discover the whereabouts of the fire. She forgot the presence of the rail, tripped, fell, and was injured. This court said: "We quite agree with counsel for appellant that previous knowledge or familiarity with the dangerous place or obstruction on the highway was not *per se* conclusive evidence of contributory negligence in failing to avoid it. In this case if plaintiff's house had been falling, rendering great haste in escaping from imminent danger necessary, the haste, excitement, and fear might reasonably be held sufficient to obliterate all memory or thought of the presence of the obstruction on the sidewalk. But that is not this case. No danger could have been apprehended by Mrs. Davis from the fire after she reached the sidewalk, but mere curiosity induced her to start to go down the street to see where the fire was. That she forgot the presence of the rail is not disputed in the evidence, but that the circumstances justified her forgetfulness and consequent want of care, cannot be conceded." In *Van Praag v. Gale*, 107 Cal. 438, [40 Pac. 555], plaintiff had recovered judgment for injuries occasioned by falling through an open and unguarded trap-door in the sidewalk. This trap-door was sometimes open and sometimes closed and plaintiff was familiar with these facts. It was held merely that his knowledge that it was sometimes open did not bar his right of recovery because he inadvertently stepped into it, and *Davis v. California Street Cable Co.* is

distinguished, this court saying: "There was a known and fixed object, namely, an iron or steel rail adjacent to a street lamp, over which plaintiff fell. In the present case the object of danger was only occasionally presented, and was not usually existent as a menace, and it was proper in such case to submit the question of plaintiff's negligence to a jury." So, also, in *Martin v. California Central Ry. Co.*, 94 Cal. 326, [29 Pac. 645], it is said, discussing an instruction given to the jury: "In effect the instruction told the jury that notwithstanding the deceased was engaged in a dangerous business requiring constant and watchful care upon his part to save himself from injury, still, if he did not always bear these things in mind, and act upon them, and by reason thereof was injured, he could recover. An injury received under such circumstances would be the direct result of contributory negligence upon the part of the party injured, and would defeat a recovery." *Giraudi v. Electric Improvement Co.*, 107 Cal. 120, [48 Am. St. Rep. 114, 40 Pac. 108], is not in conflict with these views. It is there declared that the general rule is that if one is aware of a fact which should have put him on his guard, he cannot rebut the presumption of contributory negligence by showing that he momentarily forgot. The court then proceeds to note the exceptions to the application of this general rule, the exceptions being those cases where temporary forgetfulness is not negligence as a matter of law unless it shows a want of ordinary care, and the question then becomes a question for the jury. In the case at bar there was no sudden emergency, no stress of peril, no haste in the performance of the work. The case does not belong to the exceptional class which we have been considering. It is the ordinary one of an employee heedlessly failing to take ordinary care and use ordinary precautions for his own safety. These facts were, as has been said, clearly established by the testimony introduced on behalf of plaintiff himself. It follows therefore that the court erred in denying the motion for a nonsuit and its order granting a new trial is therefore affirmed.

Henshaw, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[L. A. No. 2079. Department Two.—March 24, 1908.]

In the Matter of the Estate of GEORGE HEBERLE,
Deceased.

WILL—VOID TRUST—INTESTACY.—Where a trust attempted to be created by a will is void, if there are no other apt words in the will disposing of the property affected thereby, intestacy as to it is the result.

ID.—CONSTRUCTION IN FAVOR OF TESTACY.—A construction of a will which favors testacy is always preferred to one resulting in intestacy.

ID.—“DISTRIBUTED”—MEANING OF.—The word “distributed” is not a technical word is conveyancing and is not usually found in deeds. If it has any legal technical meaning it has such meaning with reference to decrees of distribution in probate courts.

ID.—DISPOSITION OF PROPERTY AFFECTED BY VOID TRUST.—Where a trust attempted to be created by a will in specified real estate is void, further provisions of the will, to the effect that in the event of the testator's disposing of such property, his trustees should pay the proceeds thereof to the beneficiaries of the trust, and, if not so sold, the property “is to be kept and distributed to” such beneficiaries, evince an intention on the part of the testator that such property or its proceeds should, either with or without a trust, pass to the persons designated as beneficiaries.

APPEAL from an order of the Superior Court of Los Angeles County denying a partial distribution of the estate of a deceased person. G. A. Gibbs, Judge.

The facts are stated in the opinion of the court.

Milton K. Young, F. E. Lacey, and Denis & Loewenthal, for Appellants.

Lee, Scott & Chase, Murphy & Schmidt, Edward F. Wehrle, and H. G. Weyse, for Respondents.

THE COURT.—This is an appeal from an order sustaining, without leave to amend, demurrers to the petition of Jacob Heberle and Eva Dickhof for partial distribution to them, as heirs at law, of a portion of the estate of George Heberle, deceased, it being the contention of petitioners that as to this portion he died intestate. The petitioners' *status* as

heirs at law is not in question. The only question is whether or not from a construction of the will of deceased intestacy resulted as to the property in controversy.

The deceased by his will, after directing the payment of his debts and funeral expenses, devised and bequeathed to trustees all the rest and residue of his estate upon specified trusts. By the seventh paragraph of his will he directed certain real property upon Spring Street in the city of Los Angeles, called for convenience the Spring Street property, of the estimated value of sixty-five thousand dollars, to be held by the trustees for the term of five years "and then the same by said trustees to be conveyed to the children of my deceased brother Martin Heberle, late of Miamisburg, Montgomery County, state of Ohio, share and share alike." It is conceded by all parties to this litigation that this trust is void. (*Estate of Walkery*, 108 Cal. 628, [49 Am. St. Rep. 97, [41 Pac. 772]; *Estate of Cavarly*, 119 Cal. 408, [51 Pac. 629]; *Estate of Fair*, 132 Cal. 523, [84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000]; *Estate of Dixon*, 143 Cal. 511, [77 Pac. 412]; *Estate of Sanford*, 136 Cal. 97, [68 Pac. 494].) At the time of his death the testator still owned the Spring Street property. The question to be answered is what disposition is to be made of it. Admittedly, if intestacy results as to this property, the petitioners are entitled to share in it.

Reading the whole will, we find, next, this clause: "In case I should dispose of said property, then it is my will that my trustees pay over to the said children or grandchildren of my said deceased brother the amount received by me for said property. It being my will that the said children and grandchildren of my deceased brother shall receive from my estate the said real estate or its value." By the fourteenth paragraph the testator empowers the trustees to convert real estate into money by sale. The seventeenth paragraph, however, is a limitation of this general power, and reads as follows: "That the power to sell my real estate, as set forth in the fourteenth subdivision, shall not affect my said Spring Street property, which is not to be sold, but is to be kept and distributed to the children of my said deceased brother, Martin." The trust created by paragraph seven being void in its creation, no estate as to the Spring Street property passed to the trustees. If in the will there are no other apt words disposing of the

property upon the failure of this trust, intestacy as to it must be the result. The trial court found those words in the seventeenth subdivision of the will above quoted, and in view of the fact that a construction which favors testacy is always preferred to one resulting in intestacy (*Dunphy's Estate*, 147 Cal. 96, [81 Pac. 315]), it may not be said that the interpretation is not a permissible one. The seventeenth paragraph contains a direction for the "distribution" of the Spring Street property to the children and grandchildren. While it may be argued that the word has reference to distribution by the trustees under the trust, yet it is not a word aptly used for such purpose, while it is apt in its application to a direct devise. It is equally open to the construction, therefore, that the distribution to the children is to be at the hands of the court. As is said in *Estate of Dunphy*, 147 Cal. 96, [81 Pac. 315], the word "distributed" is not a technical word in conveyancing and is not usually found in deeds. "If it have any legal technical meaning it has such meaning with reference to decrees of distribution in probate courts." It appears that while the testator designed in case he died possessed of the Spring Street property, that that property should be held for five years, yet that if the Spring Street property had been sold, they were to receive in money the amount obtained from such sale directly, and not through the medium of trustees. The paramount idea in the testator's mind, therefore, was not that the property should descend to his beneficiaries through a trust, but that, with or without a trust, they should with certainty receive property to that value from his estate. Under the wording of this instrument, therefore, the trial court was correct in holding that its conclusion that the trust was void did not, in contemplation of the other language employed in the will, so defeat the testator's intent as to render imperative a finding of intestacy.

For which reason the decree appealed from is affirmed.

Hearing in Bank denied.

[L. A. No. 1999. Department Two.—March 24, 1908.]

D. COPELW, Respondent, v. MRS. A. W. DURAND et al.,
Appellants.

BUILDING CONTRACT—CERTIFICATE OF SATISFACTORY WORK.—Where work is to be done to the satisfaction of a person, evidenced by a certificate to that effect, the production of such a certificate is a condition precedent to a right of action upon the contract.

ID.—ARCHITECT'S CERTIFICATE WHEN EXCUSED.—Where a building contract provides that the work is to be done to the satisfaction of the owner and his architect, and evidenced by the certificate of the latter, and the work is completed to their satisfaction, and thereafter the architect without warrant refuses to issue his certificate for the final payment, his refusal under such circumstances is unreasonable, and the necessity for the production of the certificate is dispensed with.

ID.—FINDING AS TO SATISFACTORY COMPLETION OF WORK.—In an action by the contractor to recover the contract price, a direct finding that the work was done to the satisfaction of the architect, impliedly but positively negatives the contention that the architect was, during the progress of the work, insisting that it was imperfect and incomplete.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Charles Monroe, Judge.

The facts are stated in the opinion of the court.

Anderson & Anderson, for Appellants.

J. Wiseman Macdonald, for Respondent.

HENSHAW, J.—Plaintiff had entered into a contract with defendants to do the painting, polishing, enameling—in short the “finishing” of the woodwork and floors of defendants’ house. By the terms of the contract, progress payments were to be made, seventy-five per cent of the contract price to be paid on completion, and twenty-five per cent thirty-six days after final completion. The progress payments were made as in the contract provided, and this action is brought to recover the twenty-five per cent final payment which defendants refused to make.

The contract provided that the work was to be "strictly first class and to be done to the entire satisfaction of the owner and the architect"; as to the payments, "that in each of said cases a certificate be obtained and signed by the said architect." Defendants' refusal to pay was based upon the declaration of the architect that the work was not first class and was not done to his satisfaction.

Where work is to be done to the satisfaction of a person, evidenced by a certificate to that effect, the production of such a certificate is a condition precedent to a right of action upon the contract. This proposition is too well established to be questioned, and indeed is not questioned in this case. (*Holmes v. Richet*, 56 Cal. 307, [38 Am. Rep. 54]; *Loup v. California etc. Co.*, 63 Cal. 97; *Cox v. McLaughlin*, 63 Cal. 196; *Tally v. Parsons*, 131 Cal. 516, [63 Pac. 833]; *Kihlberg v. United States*, 97 U. S. 398; *Wangler v. Smith*, 90 N. Y. 38, 9 Cyc. 618.)

To make his case, in the absence of such certificate, the contractor pleaded and the court found that the work was done to the entire satisfaction of the owner and the architect, and that the refusal to issue the completion certificate was wrongful and was due to plaintiff's refusal to do certain repair work which was not required of him by the contract.

The evidence, while conflicting, established to the satisfaction of the trial court the following facts: Under the terms of the contract plaintiff was to be paid \$2165. The work consisted of the finishing of the woodwork of the doors and walls and the finishing of the hardwood floors. The hardwood floors were naturally the last woodwork to be put in place and the last to be finished by the contractor. The contractor proceeded with his work upon the doors and walls, receiving partial payments. In the early part of August he had completed all this work and nothing remained for him to do under his contract but to finish the floors, which were not as yet ready for him. The architect asked the plaintiff what would be the value of the work which he had yet to do upon the floors and plaintiff replied, about two hundred dollars. The architect then stated that he would allow him the full seventy-five per cent of the contract price, deducting the value of the separate work yet to be done upon the floors, and did so, the architect himself

testifying that he knew that he had paid precisely seventy-five per cent of the entire contract price, excepting two hundred dollars, the cost or the value of the work upon the floors. It is in evidence on behalf of the plaintiff that at the time of the completion of all this woodwork, excepting the floors, the architect and owner both expressed themselves satisfied with it.

This condition of affairs obtained from August 8, 1904, when the last payment amounting to seventy-five per cent was made, until January 22, 1905, when plaintiff finally completed the work upon the floors. The delay was through no fault of his. Meantime, decorators had been called in and in doing their work they had injured the work done by plaintiff. This is not disputed, and a separate contract was entered into by defendants with plaintiff to repair the damage so occasioned by the decorators. This work, in turn, he did to the apparent satisfaction of the defendants. At least he was paid in full therefor. It is not satisfactorily explained why at this time he should have been employed at a special price to do this repair work if, as defendants' architect contends, he was at that time insisting that the original work was incomplete, unsatisfactory, and poor. The floors were done by plaintiff, as the court finds, in a satisfactory and workmanlike manner. Then when in due course plaintiff demanded his final payment, the architect refused to give him a final certificate, stating that the woodwork had been damaged by water, panels and joists were cracked and would have to be replaced, and that he looked to the plaintiff to finish these damaged panels and joists; to which plaintiff replied that he could not be expected to do the work twice when he was paid but once for it. In fact it was necessary to replace panels to the number of about sixty, and those panels in turn had to be "finished."

Appellants, however, contend that notwithstanding these progress payments which had been made, and notwithstanding the fact that the woodwork had been completed to the satisfaction of the architect and owners, and evidence of that completion given by the payment of the seventy-five per cent, still the owners and architect retained a right under the contract to exercise a later judgment and were not.

legally required to pass final judgment until the contractor was ready to turn over to them his work as complete. (*Hayes v. Second Baptist Church*, 88 Mo. 285, [57 Am. Rep. 413].) In this connection it is pointed out that the very finding of the court, while to the effect that the work had been performed to the satisfaction of the architect and owner, declared also that it was not performed in a good and workmanlike manner, so that whatever payments the owners and architect might choose to make during the progress, they still had the right to refuse the certificate for the final payment if at that time the work had not been performed to their satisfaction under the terms of the contract. This undoubtedly is true. Where, from the nature of the work, there might be latent defects not discoverable at the time of completion, but becoming patent after the lapse of time, it might be important that the architect should not exercise final judgment until after the lapse of the thirty-six days. Or where, as the architect contends in this case, the defects were apparent, and he frequently called the contractor's attention to them and paid the seventy-five per cent under repeated promises of the contractor to repair the defects before the work was finally turned over for acceptance, under such circumstances it would unhesitatingly be held that there was reserved to the architect the right of final approval or rejection at the expiration of the time named. This was the position of the defendants in this case, and that position was supported by the testimony of the architect. But the difficulty which confronts appellants lies in the fact that the court did not accept their version. Its direct finding that the work was done to the satisfaction of the architect, impliedly but positively negatives the contention that he was, during all of that time, insisting that the work was imperfect and incomplete.

The case which is thus presented is one where the work has been completed to the satisfaction of the owner and architect, and the latter thereafter and without warrant refuses to issue his certificate for the final payment. The refusal under these circumstances being unreasonable, the necessity for the production of the certificate is dispensed with. (*Katz v. Bedford*, 77 Cal. 322, [19 Pac. 523]; *Nolan*.

v. *Whitney*, 88 N. Y. 649; *Phillips etc. Co. v. Seymour*, 91 U. S. 646.)

For these reasons the judgment and order appealed from are affirmed.

Lorigan, J., and McFarland, J., concurred.

[L. A. No. 1961. Department Two.—March 24, 1908.]

JOHN B. CAMPBELL, Appellant, v. SANTA MARIA OIL
AND GAS COMPANY, Respondent.

CORPORATION—SALE FOR STOCK—OFFER AND ACCEPTANCE—UNAUTHORIZED INDORSEMENT ON CERTIFICATE OF NON-ASSESSABILITY.—Where an offer is made to a corporation to sell it certain property for a certain number of shares of its “fully paid and non-assessable stock,” a counter offer made by the corporation to buy the property and pay therefor in “fully paid stock,” nothing being said about its non-assessability, and its acceptance by the seller, determines the contractual rights of the parties; and the unauthorized indorsement of the words “non-assessable” on the certificates of stock issued in payment for the property, has no effect in determining the rights of the original parties to the contract.

ID.—ASSESSMENT—DIRECTOR ESTOPPED TO QUESTION VALIDITY.—A director of a corporation, who voted affirmatively for the adoption of a resolution levying an assessment on the corporate stock, is estopped from questioning its legality. And such estoppel is equally effective against his assignee.

APPEAL from an order of the Superior Court of Los Angeles County refusing a new trial. M. T. Allen and Charles Monroe, Judges.

The facts are stated in the opinion of the court.

J. F. Conroy, for Appellant.

Wright, Bell & Ward, for Respondent.

HENSHAW, J.—This is an action brought by the assignee of one Kloeckner to recover certain stock sold for delinquent assessment under section 347 of the Civil Code. Defendant is a California corporation, having a capital stock of five hun-

dred thousand dollars divided into five hundred thousand shares of the par value of one dollar each. Plaintiff's right to relief is based upon his allegations of certain irregularities in the assessment and upon his claim that there was an agreement that the stock in question should be non-assessable. The court found against plaintiff's contentions. Judgment passed for the defendant and plaintiff appeals.

As plaintiff is but the assignee of Kloeckner, with whom all of the transactions of the corporation were had, his name may be dropped from consideration. Kloeckner and others were the lessees of certain oil land in Santa Barbara County. The owners of the leasehold concluded to incorporate for convenience in operating their property. To that end certain of them, including Kloeckner, subscribed to articles of incorporation and for five shares of the capital stock of the defendant company. The incorporation was duly had. At the first directors' meeting after the officers of the corporation had been chosen, Kloeckner, being one of the directors and secretary of the corporation, proposed that the corporation acquire the leasehold, if possible, from himself and his associates, "and to use in payment of the purchase, capital stock of the company to any amount not to exceed three hundred thousand dollars. The stock to be issued as fully paid and non-assessable by the company." At the stockholders' meeting next held, the stockholders requested the board of directors "to purchase said leasehold interest for the price of three hundred thousand dollars, payable in the fully paid stock of this company." After this action at the stockholders' meeting, another directors' meeting was held at which the proposition was fully discussed and it was resolved to acquire the leasehold estate "for three hundred thousand shares of the fully paid stock of this company." The offer thus formulated, the court finds was accepted and the leasehold conveyed to the corporation for three hundred thousand dollars of the fully paid capital stock of the company. The conveyance was actually made to the corporation, the stock ordered issued to Kloeckner and his associates in such proportion as Kloeckner himself directed upon payment by the purchasers of the United States revenue tax. Kloeckner, in fact, prepared these certificates for issuance. The stock certificates, which he himself, as secretary, procured to be printed, bore upon the face of each without

authority from the board of directors, the words "non-assessable." The contention that the contract between Kloeckner and the company was for non-assessable stock is based upon these circumstances. But it was not the mere offer of Kloeckner to sell the leasehold interest for three hundred thousand dollars of non-assessable stock which fixed the liability of the corporation, it was the offer which the corporation in turn made to Kloeckner, and which he accepted, which determines the rights of the parties. By that offer, and in the acceptance of that offer, it nowhere appears that non-assessability of the stock was a condition of the contract. In terms, the leasehold was to be conveyed to the corporation for three hundred thousand shares of the fully paid capital stock of the company, and this in fact was done, and the circumstances that Kloeckner himself caused to be printed on the stock certificates of the company the words "non-assessable" can have no weight in determining the rights of the original parties to the contract, whatever effect the words might have if the stock had passed into the hands of an innocent purchaser, without notice.

It was pleaded by the defendant that Kloeckner was estopped from denying the validity of the assessment, in that he was a director of the defendant corporation and voted affirmatively for the adoption of the resolution levying the assessment. The court so found upon abundant evidence. That having participated in all of these matters; and, having voted as a director for the levying of this assessment, an estoppel is raised against Kloeckner's objections to the defects and irregularities in the assessment, is too well settled to require discussion. It is sufficient to refer to the cases of *Martin v. Burns Wine Co.*, 99 Cal. 357, [33 Pac. 1107]; *Macon and Augusta R. R. Co. v. Vason*, 57 Ga. 314; *Kansas City Hotel Co. v. Harris*, 51 Mo. 464; *Willamette Freighting Co. v. Stannus*, 4 Or. 263; *Stone v. Great Western Oil Co.*, 41 Ill. 86. As an estoppel, of course, binds the parties and their privies, the estoppel is equally effective against Kloeckner's assignee, plaintiff in this action. (*Kessler v. Ensley Co.*, 123 Fed. 559; *Union Dime Savings Bank v. Wilmot*, 94 N. Y. 228, [46 Am. Rep. 137].)

The final contention of the plaintiff is that he elected under section 347 of the Civil Code to pay, and tender to the

corporation, the amount of the assessment, with costs, but as the court holds, his averment was simply that he offered to pay the costs and assessment on the last day of the six months immediately preceding the sale. This offer was insufficient to entitle Kloeckner to redeem or to entitle him to bring the action under the section above cited, inasmuch as no tender of payment was made of the amount of interest.

For these reasons the judgment and order appealed from are affirmed.

Lorigan, J., and McFarland, J., concurred.

Hearing in Bank denied.

[S. F. No. 4976. In Bank.—March 26, 1908.]

CLARK P. STREATOR, Appellant, v. JAMES A. LINSKOTT
et al., Respondents.

SCHOOL BONDS—INJUNCTION BY TAXPAYER—PLEADING—LEGAL CONCLUSION.—In an action by a taxpayer to enjoin the issuance of bonds of a school district, an allegation in the complaint that the plaintiff "has no speedy or adequate remedy at law" is a mere conclusion of law, and valueless in the absence of averment of facts supporting it.

Id.—BONDS INVALID ON THEIR FACE.—A taxpayer cannot maintain an action to enjoin the issuance of such bonds on the ground of their illegality, where the bonds, if issued, would show their illegality on their face. In such case, the bonds would be void even in the hands of *bona fide* holders for value, and the taxpayer would not be injured.

Id.—APPEAL—QUESTIONS OF LAW NOT INVOLVED.—The supreme court on an appeal from a judgment which was rightly made by the trial court, in an action involving an issue of municipal bonds, will not pass upon mere abstract questions of law, not involved in the determination of the appeal, at the request of a party who shows no substantial right that can be affected by a decision either way.

APPEAL from a judgment of the Superior Court of Santa Cruz County. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

Hugh R. Osborn, City Attorney, for Appellant.

Benj. K. Knight, District Attorney, for Respondents.

SLOSS, J.—This is an action brought by a resident and taxpayer of the city of Santa Cruz against the chairman of the board of supervisors and other officers of the county of Santa Cruz to enjoin them from signing or issuing certain bonds authorized by a vote of the electors of a school district embracing the city of Santa Cruz and certain outlying territory. A demurrer to the complaint was sustained and the plaintiff appeals from the ensuing judgment of dismissal.

The complaint sets forth the proceedings had for the purpose of authorizing the issuance of the bonds. It is not disputed that these proceedings were in strict accordance with sections 1880 to 1886 of the Political Code. The position of the appellant is, however, that these sections have, as to school districts composed in whole or in part of municipal corporations of the fifth class (to which it is claimed the city of Santa Cruz belongs) been superseded by an act entitled: "An act to enable school districts in cities of the fifth class, and school districts which embrace territory, a portion of which is within and a portion of which is without such cities of the fifth class, to issue bonds . . ." etc., approved March 23, 1893 (Stats. 1893, p. 292), and an amendment to said act approved March 11, 1897 (Stats. 1897, p. 103). It is pointed out that the provisions of this act, as amended, are violated in various particulars by the bonds proposed to be issued and the proceedings purporting to authorize their issuance. The contention of the respondents in the lower court apparently was that the act of 1893, and its amendment, if applicable to the school district in question, are unconstitutional.

The judgment contains a statement showing that the court below declined to pass upon the constitutional question involved, and that the demurrer was sustained upon the ground that the complaint did not show that the plaintiff would suffer any injury by reason of the issuance of the bonds.

In this the court was clearly right. All that the complaint contains connecting the plaintiff with the subject-matter of the suit is to be found in the allegations that he is a resident and taxpayer of the city of Santa Cruz and that he "has no speedy or adequate remedy at law." The latter is, of course, a mere conclusion of law, valueless in the absence of averment of facts supporting it.

The complaint sets forth at length an order of the board of supervisors prescribing the form of the proposed bonds. From this it appears that the bonds themselves, if issued, will contain at least two provisions which, according to the contention of the appellant, conflict with the requirements of the act of 1893 as amended: 1. The bonds provide that interest shall be payable annually, while the only authority given by the act of 1893 is to issue bonds bearing interest "to be payable semi-annually"; 2. The bonds declare that they are issued and sold "for the purpose of raising money for purchasing school lots, for building one or more school-houses, or *insuring the same*, . . ." etc. The act of 1893 does not authorize the issuance of bonds for the purpose of insuring schoolhouses or other property.

The respondents suggest no doubt of the sufficiency of either of these objections to invalidate the bonds, if the act of 1893 is the only law authorizing the issuance of such bonds. If the appellant is right in his contention that this act is the one that governs, the alleged invalidity of the issue will appear on the face of the bonds, and they will be void even in the hands of *bona fide* holders for value. "It results that the plaintiff as a taxpayer can suffer no damage if the bonds are put in circulation, and has no cause of action." (*McCoy v. Bryant*, 53 Cal. 247; *Hopkins v. Lovell*, 47 Mo. 102; *Polly v. Hopkins*, 74 Tex. 145, [11 S. W. 1084].)

We are informed by the appellant's brief that this is "a friendly proceeding to determine the validity of the legal method adopted," and are asked to decide the question of such validity "independent of the ground upon which the superior court based its decision." This we cannot do. If we should, upon examination, agree with the contention that this district, in issuing bonds, must proceed under the act of 1893, we could not afford the appellant any relief without reversing a judgment which was rightly made upon a ground

fairly presented by the record. Furthermore, regardless of the fact that the trial court based its decision upon this particular ground, this court will not undertake to decide abstract questions of law at the request of a party who shows no substantial right that can be affected by a decision either way. It may be advantageous for municipalities, desiring to issue bonds, to obtain from this court, in advance, a "certificate of title" attesting the validity of the proposed issue, but such relief can be obtained only in a proper proceeding, that is, one in which the decision of the question sought to be presented will be necessary to the disposition of a real controversy between parties having an actual interest in the matter in litigation.

The judgment is affirmed.

Shaw, J., Angellotti, J., Henshaw, J., and Lorigan, J., concurred.

[S. F. No. 4975. In Bank.—March 28, 1908.]

CITY OF SAN DIEGO, Petitioner, v. DANIEL POTTER,
as Auditor of the City of San Diego, Respondent.

MUNICIPAL CORPORATIONS—RONDED INDEBTEDNESS—ACT OF FEBRUARY 25, 1901—PURPOSES FOR WHICH BONDS MAY BE ISSUED.—Under the act of February 25, 1901 (Stats. 1901, p. 27), authorizing the incurring of indebtedness by municipal corporations, municipal bonds cannot be issued except for a purpose for which the ordinary revenues of the city might be lawfully expended.

ID.—STREETS, HIGHWAYS, AND BOULEVARDS—BONDS MAY BE ISSUED FOR BUILDING—PARK AND BOULEVARD ACT.—The building and construction of streets, highways, and boulevards are objects for which the legislative body of a city or town may, in their discretion, expend the ordinary revenues of the city (Vrooman Act, sec. 26), and for that reason fall within the purposes for which bonds may be issued under the act of 1901, and are also included in the term "street work" used in said act, which means "work upon a street," either in repairing or making it. And bonds of the municipality may be issued for these purposes under the act of 1901, notwithstanding the existence of the Public Park and Boulevard Act of March 19, 1889 (Stats. 1889, p. 361). If, however, there be included with these authorized purposes an unauthorized purpose, for the whole of which a single aggregate sum is specified, it is impossible to separate the good from the bad, and the whole must fall.

ID.—LAND FOR STREETS, HIGHWAYS, AND BOULEVARDS—CITY OF SAN DIEGO.—The city of San Diego, under the provisions of its charter, and the general laws of the state thereby made applicable to such matters, to wit, the act of 1889, p. 70, and the act of 1903, p. 376, is authorized to pay the whole cost of land to be used for roads, streets, highways, or boulevards from the ordinary revenues of the city, if they deem the improvement of such general benefit to the city that the whole city constitutes the district to be benefited thereby, and may issue municipal bonds therefor, under the act of 1901, notwithstanding the existence of the Public Park and Boulevard Act of March 19, 1889.

ID.—SUBMISSION OF UNAUTHORIZED PROPOSITION—ELECTION.—Under the act of 1901, the mere submission of a proposition to incur a bonded indebtedness for a purpose not authorized by the act at an election held under the act, does not have the effect to invalidate the election as to all other authorized propositions then submitted.

ID.—PUBLIC PARK.—Under the act of 1901, a municipality has the power to incur a bonded indebtedness for the purpose of acquiring land for a public park.

ID.—DESIGNATION OF ACT UNDER WHICH BONDS ARE ISSUED.—Where the provisions of the act of 1901 as to notice, etc., were literally complied with in the proceedings leading up to the issuance of the bonds, such proceedings were not invalidated for the failure of the city council to designate in the ordinance calling the election, or in some order or record prior to the election, whether the bonds proposed for boulevards and parks were to be issued under the Park and Boulevard Act of 1889 or the general act of 1901. There is nothing in the law requiring such designation.

ID.—SERIAL PAYMENT OF BONDS—ORDER OF PAYMENT.—Where a certain indebtedness authorized by the electors was for the sum of \$59,108.55, a subsequent ordinance providing that such indebtedness should be evidenced by one hundred and nineteen bonds, one hundred and eighteen of which should be of the denomination of five hundred dollars and one of \$108.55, the five-hundred-dollar bonds to be numbered from 1 to 118 consecutively, and the \$108.55 to be numbered 119, and also that "three of said bonds shall be due and payable annually . . . the order of payment beginning with the smallest numbered bond and continuing from the less to the greater until all of said bonds shall have been paid," is in compliance with section 5 of the act of 1901, requiring the legislative body of the municipality to provide for the annual part payments of the bonds in sums not less than one-fortieth part of the whole amount of the indebtedness.

APPLICATION for a Writ of Mandate directed to the Auditor of the City of San Diego.

The facts are stated in the opinion of the court.

George Puterbaugh, City Attorney, for Petitioner.

Sam Ferry Smith, and O'Melveny, Stevens & Millikin,
Amici Curiae, for Respondent.

ANGELLOTTI, J.—This is an application for a writ of mandate to compel defendant to perform certain ministerial acts relative to certain municipal bonds of plaintiff. It is conceded that he is bound to perform these acts if the bonds are not void, and defendant's refusal to so perform is based on the contention that they are void.

The bonds were issued under the act of the legislature enacted in the year 1901, entitled, "An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations for municipal improvements, and regulating the acquisition, construction, or completion thereof" (Stats. 1901, p. 27,) and admittedly all the proceedings were in strict accord with the provisions of that act except as hereinafter noted.

Seventeen separate matters were specified in the resolution adopted by the common council expressing the determination of the council as to the public interest and necessity, with a statement of the estimated cost of each, and the ordinance subsequently adopted calling a special election submitted to the electors seventeen separate propositions for incurring a bonded indebtedness, one proposition as to each of the matters specified in the former resolution. Each of fourteen of these propositions received at such special election the requisite number of votes to carry it, and the bonds were issued thereon. The other three propositions were defeated. It is claimed that among the seventeen propositions submitted at this election there were three which were not authorized to be submitted by the provisions of the act (two of which were carried), and that the effect of including the same was to render the election a nullity as to all the propositions submitted.

The propositions attacked are the following:—

"Fourth: Shall the city incur a bonded indebtedness of seventy thousand dollars other and different than any other indebtedness proposed in this ordinance, for the extension and improvement of the street and highway system of the

city, all as shown in this said resolution and in the recital thereof in the preamble of this ordinance?" In such resolution and preamble the matter is stated thus: "IV. The building, construction and acquisition of the following lines of boulevards in said city, namely:"—followed by a designation and general description of various boulevards, and a statement of the estimated cost of each.

"Fifth: Shall the city incur a bonded indebtedness of five thousand dollars other and different than any other indebtedness proposed in this ordinance, for the building, construction and acquisition of a road from the intersection of 'M' and Thirty-second streets to Mount Hope Cemetery, all as shown in the said resolution and in the recital thereof in the preamble of this resolution?" In such resolution and preamble the proposition is put in the same way, except that after the words "Mount Hope Cemetery" the following is stated: "together with the acquisition of the land on which such road may be located, according to the survey thereof made by the city engineer of said city, and filed with the city clerk thereof," etc.

"Seventeen: Shall the city incur a bonded indebtedness of five thousand dollars, other and different than any other indebtedness proposed in the ordinance, for the construction of three public lavatories to be hereafter located in the city," etc.

The fourth and fifth propositions may be considered together. It is established by the decision of this court in *Redondo Beach v. Cate*, 136 Cal. 146, [68 Pac. 586], that the general act of March 19, 1889 (Stats. 1889, p. 399), did not authorize the issuance of bonds except for a purpose for which the ordinary revenues of the city might be lawfully expended. This doctrine has not been modified by any subsequent decision. The act of February 25, 1901, is the same as the general act of March 19, 1889, in every respect material to this question, and is not susceptible of a different construction. If, therefore, any proposition included a purpose for which the ordinary revenue of the city could not be used, it was not authorized by the act of 1901. It is clear that the fifth proposition included in addition to the building and construction of the road to Mount Hope Cemetery, the acquisition of the land on which the road was to be located. We think it is equally clear that the fourth proposition included

not only the building and construction of certain boulevards, but also the acquisition of the land upon which at least some of them were to be constructed. The term "acquisition" used in relation to the boulevards, is certainly broad enough to include the obtaining of the lands upon which they are to be laid out. The building and construction of streets, highways, and boulevards are objects for which the legislative body of a city or town may, in their discretion, expend the ordinary revenues of the city (Vrooman Act, sec. 26), and for that reason fall within the purposes for which bonds may be issued under the act of 1901, besides being included in the term "street work" used in said act, which has been defined to mean "work upon a street—work in repairing or making a street." (See *Mill Valley v. House*, 142 Cal. 700, [76 Pac. 658].) And bonds may be issued for those purposes under the act of 1901, notwithstanding the existence of the Public Park and Boulevard Act of March 19, 1889. (Stats. 1889, p. 361.) (See *City of Oakland v. Thompson*, 151 Cal. 572, [91 Pac. 387].) But if there be included with these authorized purposes an unauthorized purpose, for the whole of which a single aggregate sum is specified, it is impossible to separate the good from the bad, and the whole must fall. Defendant's claim in this regard is that there is no law that authorizes the common council of the city of San Diego to pay for the land to be used for roads, streets, highways, or boulevards, from the ordinary revenues of the city. This claim does not appear to us to be well founded. The city charter expressly empowers the council to widen any road, and to open or lay out any new street or highway through public or private property, and makes the general laws of the state relative to such matters applicable. The general laws applicable appear to be the act of 1889 (Stats. 1889, p. 70), and the act of 1903 (Stats. 1903, p. 376), under either of which it was the right of the city to proceed. (Stats. 1903, sec. 36, p. 386.) As is claimed by learned counsel, the act of 1889 does provide for the payment of the expenses of acquiring the necessary land, etc., from a fund to be collected by an assessment upon the property of the district benefited thereby, but the effect of section 22 thereof clearly is to authorize the council to pay the whole thereof from the ordinary revenues of the city, if they deem the improvement of such general benefit to the

city that the whole city constitutes the district to be benefited thereby. The section is practically the same in effect in the respect under discussion as section 26 of the Vrooman Act, authorizing the council to pay the whole or any portion of the cost of street work out of the ordinary revenues of the city. We are of the opinion that this is a complete answer to the objection made by learned counsel to the fourth and fifth propositions, based upon the decision of this court in *Redondo Beach v. Cate*, 136 Cal. 146, [68 Pac. 586], the propositions being for certain designated boulevards and roads which the council had in effect declared to be of such general benefit to the city that the city should pay the whole cost thereof. These propositions were, therefore, within the act of 1901, and this is true notwithstanding the existence of the Public Park and Boulevard Act. (*City of Oakland v. Thompson*, 151 Cal. 572, [91 Pac. 389].)

The seventeenth proposition, the proposed issuance of bonds for five thousand dollars for the construction of three public lavatories, was not carried at the election, and no bonds have been issued thereon. The question whether it was an authorized proposition under the act of 1901 is, therefore, important only in the event that it be held that the submission of a proposition for an indebtedness not authorized by the act at an election held under the act, would invalidate the election as to all the other propositions submitted. The contention to this effect is based on the language of the act, which, after providing that the legislative body of the municipality, having first determined by resolution that the public interest or necessity demands the acquisition, construction, or completion "of any municipal improvement, including bridges, waterworks, water-rights, sewers, light or power works or plants, buildings for municipal uses . . . street work, or other works, property or structures necessary or convenient to carry out the objects, purposes and powers of the municipality," provides that such legislative body may at any subsequent meeting, call a special election, and submit thereat "the proposition of incurring a debt for the purpose set forth in said resolution, and no question other than the incurring of the indebtedness for said purpose shall be submitted; provided that propositions of incurring indebtedness for more than one object or purpose

may be submitted at the same election." The proviso as to different propositions being submitted at the same election was enacted for the first time in the act of 1901, the former act covering the same subject-matter, that of March 19, 1889 (Stats. 1889, p. 399), not containing any such proviso. The proviso was not essential to the proper submission at the same election of more than one of the propositions included in the act, for without it the act clearly permitted such submission, and such was undoubtedly the practice under the former act. (See *Derby v. Modesto*, 104 Cal. 515, [38 Pac. 950]; *City of San Luis Obispo v. Haskin*, 91 Cal. 549, [27 Pac. 929].) It is to be noted that the former act, without the proviso, provided, immediately after the limitation above quoted, that "the ordinance calling such special election shall recite the *objects* and *purposes* for which the indebtedness is proposed to be incurred," which is a confirmation of this construction of the previous language. We cannot assume that the object of the insertion of the proviso in the act of 1901 was simply to authorize that to be done which was already fully authorized by the language of the former act. It appears clear to us that the object of the proviso was to limit the prohibition immediately preceding by making it inapplicable to any proposition of incurring indebtedness. This is the plain literal meaning of the language used in the limitation and proviso, and such meaning appears to us to give full effect to the legislative purpose. The argument of learned counsel that the purpose of the prohibition was to secure a free and fair expression of the will of the voters on the propositions for indebtedness, unaffected by the consideration of other questions, and without the opportunity of political trades and combinations that would be afforded by the submission at the same time of other propositions may be conceded to be well based, but as we view the language of the act it must be held that the legislature deemed that this purpose would be sufficiently attained by a limitation of the electors to a consideration of propositions for indebtedness, unembarrassed by the consideration of propositions of a different nature. It will be noted that the act of 1901 is broad enough in terms to include the issuance thereunder of bonds for practically every kind of municipal improvement that a city is empowered to make by the law applicable to it, and

it can hardly be assumed in the face of language admittedly permitting the submission at the same election of propositions for indebtedness for the many different purposes authorized by the act, that the legislature was in any degree seeking to avoid possible evils resulting from the submission at one time of many different propositions for indebtedness. We cannot see that the fact that a proposition for indebtedness submitted is one for an indebtedness which the city has no power to incur affects the question at all. Although unauthorized, it is nevertheless a proposition of incurring indebtedness, the submission of which is not prohibited by the prohibitory clause relied on, and, therefore, its submission does not invalidate the election as to the remaining authorized propositions. In view of our conclusion upon this point, it is unnecessary to determine whether the city of San Diego had the power to expend municipal funds for "public lavatories."

The demurrer of defendant also makes the point that a proposition for a bonded indebtedness of twenty-five thousand for the acquisition of a park was unauthorized. This proposition was, like the public lavatory proposition, defeated at the election. What we have said in regard to the lavatory proposition is applicable to this. However, in view of the decision in *City of Oakland v. Thompson*, 151 Cal. 572, [91 Pac. 387], it must be held that the proposition for this indebtedness was properly submitted under the act of 1901.

We see no force in the contention that the proceedings for the issuance of the bonds are void for failure on the part of the council to designate in their ordinance calling the election, or in some order or record prior to the election, whether the bonds proposed for boulevards and parks were to be issued under the Park and Boulevard Act of 1889, or the general act of 1901. It seems to us that it was apparent on the face of the record that the proceeding was one under the act of 1901, but whether this be so or not, it is clear that the provisions of the act of 1901 as to notice, etc., were literally complied with, and that there is nothing in the law requiring the designation referred to.

The only other objection made is one to the ordinance adopted after the election providing for the issuance of the

bonds. The act of 1901 provides in section 5, that bonds issued under the act shall be payable substantially in the manner following: "A part to be determined by the legislative body of the municipality, which shall be not less than one-fortieth part of the whole amount of such indebtedness, shall be paid each and every year on a day and date, at the city treasury, to be fixed by the legislative branch of the municipality," etc. As to the bonds to be issued in the sum of \$59,108.55 for a certain indebtedness authorized by the electors, the ordinance provided that there should be 119 of said bonds, 118 of which should be of the denomination of five hundred dollars, and one of the denomination of \$108.55, the five hundred dollar bonds to be numbered from 1 to 118 consecutively, and the \$108.55 bond to be numbered 119, and also: "Three of said bonds shall become due and payable annually at the time and in the manner hereinafter specified, the order of payment beginning with the smallest numbered bond and continuing from the less to the greater until all of said bonds shall have been paid." It is said that as 119 is not a multiple of three, it would be impossible for the ministerial officers charged with the duty of preparing the bonds to prepare them so as to make them payable three each year. We see no room for misunderstanding as to the requirement of the ordinance in this regard. What it means and provides is that the 119 bonds shall be so prepared that commencing with the smallest numbered bond three shall become due and payable each year, leaving two to become due and payable the last or fortieth year.

We have now noticed all of the objections made by counsel to the bonds, and are of the opinion that none is well based. It follows that plaintiff is entitled to the relief sought.

Let a peremptory writ of mandate issue in accord with the prayer of the petition.

Shaw, J., Sloss, J., Henshaw, J., Lorigan, J., and Beatty, C. J., concurred.

NOTE.—Mr. Justice McFarland, not having heard the argument in this case, does not participate herein.

[S. F. No. 4965. In Bank.—March 28, 1908.]

PAULINE GORDAN, Petitioner, v. THOMAS F. GRAHAM,
as Judge of the Superior Court of the City and County
of San Francisco, Respondent.

PARTITION—INTERLOCUTORY DECREE—APPEAL FROM ORDER CONFIRMING SALE—TENANT IN POSSESSION MAY APPEAL.—Where the interlocutory decree in an action of partition directed a sale of the common property, one who was adjudged to be a tenant in common, and who was in possession, had the right to oppose the confirmation of the sale, and to have it vacated if not made in conformity with law, or for an adequate price, and the corresponding right to review, on appeal, an order confirming such sale.

ID.—INTERLOCUTORY DECREE IS FINAL JUDGMENT.—The interlocutory decree directing the sale is to be regarded as a final judgment with respect to subsequent orders in aid of its execution.

ID.—ORDER FOR WRIT OF ASSISTANCE IS APPEALABLE.—An order for a writ of assistance, directing the sheriff to put the purchaser at the partition sale in possession, must also be considered, for the purposes of an appeal, as an order made after final judgment.

ID.—EX PARTE ORDER—APPEAL FROM ORDER REFUSING VACATION OF WRIT.—Where the order for the writ of assistance was made *ex parte*, without notice to the tenant in possession, the latter had the right, in order to secure an available record on appeal, to move for a vacation of the order and writ, and, if the motion were denied, to appeal from the order of denial, instead of appealing directly from the *ex parte* order.

ID.—UNDERTAKING TO STAY PROCEEDINGS—DUTY OF JUDGE TO FIX AMOUNT—MANDAMUS.—An appeal by the tenant in possession from an order refusing to vacate the order for the writ of assistance, is in substance an appeal from an order for the delivery of possession of real estate, and under section 945 of the Code of Civil Procedure it was the duty of the trial judge, upon a proper application in that behalf, to fix the amount of the undertaking to be given to stay proceedings on the writ, pending the appeal, and *mandamus* lies to compel performance of the duty.

APPLICATION for a Writ of Mandamus directed to Thomas F. Graham, as judge of the Superior Court of the City and County of San Francisco.

The facts are stated in the opinion of the court.

W. T. Kearney, for Petitioner.

Louis Hirsch, and Jesse H. Steinhart, for Respondent.

SHAW, J.—This is an application for a writ of mandate.

On February 14, 1908, in an action for partition, entitled *Rosa Bloom v. Pauline Gordan*, the superior court made an order denying the petitioner's motion to vacate an order for a writ of assistance theretofore issued therein, directing the sheriff to remove petitioner from the premises involved in the suit and place one Fannie Abrahamson in possession thereof. Desiring to appeal from this order and to obtain a stay of proceedings on the writ pending the appeal, the petitioner applied to the respondent to fix the amount of the undertaking necessary to stay such proceedings. This the respondent refused, and petitioner asks a mandate to compel respondent to proceed to fix the amount of the proposed undertaking.

An interlocutory decree of partition directing the sale of the property by the referees was filed in *Bloom v. Gordan* on January 9, 1906, and it became final on March 10, 1906, if not before. (*Bloom v. Gordan*, 150 Cal. 763, [90 Pac. 115].)

The sale was made by the referees to Fannie Abrahamson, in pursuance of the decree, and, after due notice, it was confirmed by an order made on January 15, 1908, and entered on February 3, 1908. The writ of assistance was issued by authority of an order made *ex parte* on February 11, 1908. On February 13, 1908, the petitioner, Pauline Gordan, gave notice of appeal from the order confirming the sale and filed the undertaking on appeal as required by law. She had notice of the making of that order, but no formal notice of the entry thereof, so far as appears, has ever been given to her.

The interlocutory order of partition adjudged that Pauline Gordan was the owner of an undivided one third of the premises, as tenant in common. She was in possession. A valid sale and conveyance under the order would terminate her interest and right of possession. She had the right, therefore, to oppose the confirmation of a sale and to have it vacated if not made in conformity with law, or for an adequate price, and the corresponding right to review, on appeal, an order confirming such sale. It has been held that

the purchaser at such a sale may appeal directly from an order vacating the sale, that, so far as he is concerned, such order is appealable as an order made after final judgment, and that the interlocutory order directing a sale is to be regarded as a final judgment with respect to subsequent orders in aid of its execution. (*Hammond v. Cailleaud*, 111 Cal. 213, [52 Am. St. Rep. 167, 43 Pac. 607]; *Dunn v. Dunn*, 137 Cal. 56, [69 Pac. 847].) If it is an order made after final judgment, and appealable as such by the purchaser, it must be so as to the adverse parties, the tenants in common. The appeal of Pauline Gordan from the order confirming the sale is therefore a valid appeal, if regularly taken. In so far as *Rovegno v. Hunt*, 83 Cal. 446, [23 Pac. 524], is contrary to this conclusion, it must be considered as overruled by the decisions in *Hammond v. Cailleaud* and *Dunn v. Dunn*. We think it was wrong in principle, on that point.

Neither the interlocutory order for the sale, nor the order confirming the sale, directed that the purchaser be let into possession. That direction was first given by the court when it made the *ex parte* order that a writ of assistance should issue to the sheriff. The latter also must be considered, for the purposes of an appeal, as an order made after final judgment, it being as plainly in aid of the order of sale as is the order of confirmation. Being made *ex parte*, the tenant in possession having no notice, she had the right, in order to secure an available record on appeal, to move for a vacation of the order and writ, and, if the motion were denied, to appeal from the order of denial, instead of appealing directly from the *ex parte* order. (*Pignaz v. Burnett*, 119 Cal. 163, [51 Pac. 48].)

In substance this appeal is from an order for the delivery of possession of real estate, and it was therefore the duty of the respondent under section 945 of the Code of Civil Procedure, upon a proper application in that behalf, to fix the amount of the undertaking to be given to stay proceedings on the writ, pending the appeal, and *mandamus* lies to compel performance of the duty. This was expressly decided in *Green v. Hebbard*, 95 Cal. 39, [30 Pac. 202].

Rovegno v. Hunt, 83 Cal. 445, [23 Pac. 524], is cited as a case holding that *mandamus* is not maintainable in such a case. In that case, however, the order confirming the sale

directed that the purchaser be put into possession upon the delivery of the deed. No appeal had been taken therefrom, and it had become final by lapse of the time for appeal. Hence there could be no merit in an appeal from a subsequent order granting a writ of assistance, and it was obviously taken merely to vex and annoy the purchaser. For that reason the writ of mandate in that case was denied. *Mandamus* is a discretionary writ, and it may perhaps be denied when it is sought in aid of an obviously vexatious and fruitless appeal. (*Wiedwald v. Dodson*, 95 Cal. 453, [30 Pac. 580]; *Gay v. Torrance*, 145 Cal. 147, [78 Pac. 540]; 26 Cyc. 149, 156; 19 Am. & Eng. Ency. of Law, pp. 754, 758.) It is suggested that the appeal from the order confirming the sale is likewise without merit, because no bill of exceptions to the order has been proposed or settled and the time therefore has expired. But the order has not been exhibited to us, and we cannot say that it may not be erroneous on its face. (See 26 Cyc. 152.)

It is ordered that a peremptory writ issue as prayed for, and that proceedings on the writ of assistance be stayed until the expiration of five days after the respondent shall have fixed the amount of the undertaking to be given by petitioner to stay proceedings thereon pending an appeal from the order refusing to vacate the order directing the issuance of the writ of assistance.

Sloss, J., Angellotti, J., Henshaw, J., Lorigan, J., and Beatty, C. J., concurred.

[Sac. No. 1505. In Bank.—March 28, 1908.]

CHARLES SWANSTON and GEORGE SWANSTON, Respondents, v. ANNA E. CLARK, Appellant.

SPECIFIC PERFORMANCE—LEASE WITH OPTION TO PURCHASE—ELECTION TO PURCHASE—REFORMATION.—*Held*, that the complaint as amended states a cause of action for the enforcement of an option to purchase contained in a lease, which plaintiff had elected to exercise during the term, and to reform the lease for mutual mistake, in regard to the improvements, which removed all uncertainty in rela-

tion thereto, though such uncertainty did not make the contract uncertain as an agreement to sell.

ID.—ADEQUACY OF CONSIDERATION FOR OPTION—TERMS OF RENTAL.—The payment of increased rent on account of the option, and the payment of rent in advance for one year, was a sufficient consideration for the option.

ID.—INSUFFICIENT PLEA OF RESCISSION PRIOR TO TENDER—ABSENCE OF OFFER TO COMPENSATE FOR IMPROVEMENTS.—A plea of rescission of the option to purchase prior to the tender of purchase money by plaintiff, is insufficient, where it admitted the making of valuable improvements by the plaintiff and did not offer to compensate the plaintiff therefor, nor show any right of rescission for one or more of the causes enumerated in section 1689 of the Civil Code, or any rescission by consent.

ID.—CROSS-COMPLAINT TO RESCIND FOR MISTAKE AND FRAUD—SUPPORT OF CONTRARY FINDING.—Where the defendant filed a cross-complaint to rescind the contract for mistake as to its contents induced by fraudulent representations of the plaintiff, *held*, that findings to the contrary are supported by the evidence and defendant had no right of rescission.

ID.—MODIFICATION OF JUDGMENT FOR CONVEYANCE—FREEDOM FROM LIENS—POSSESSION OF PLAINTIFF.—Where plaintiff took possession, the contract providing for a conveyance free from all liens but the lease, the judgment should be modified so as not to charge defendant with liens after the date of plaintiff's possession, other than such as were made or suffered by the defendant, as at her instance, or for her benefit.

ID.—LEASE NOT AN ENCUMBRANCE—MERGED IN CONVEYANCE.—The lease being merged in the conveyance provided for by the decree, is not an encumbrance and is not included in the liens to be provided against, in the decree for specific performance.

APPEAL from a judgment of the Superior Court of Sacramento County and from an order denying a new trial. J. W. Hughes, Judge.

The facts are stated in the opinion of the court.

William M. Sims, Albert M. Johnson, and Hiram W. Johnson, for Appellant.

L. T. Hatfield, and A. L. Shinn, for Respondents.

SHAW, J.—The record presents appeals from the judgment and from an order denying defendant's motion for a new trial.

The action is to enforce specific performance of a written contract to sell real estate. The complaint was amended four times and there were subsequently two specific amendments allowed to the fourth amended complaint. There is some contention by appellant that the court erred in allowing these amendments and that there was error in overruling demurrers to the several complaints as they existed prior to the last amendment. The propriety of allowing amendments is a question for the trial court and its ruling can be attacked on appeal only for an abuse of discretion. No abuse of discretion appears. The result is that the sufficiency of the complaint before it was finally perfected by the last amendment is immaterial.

The complaint as finally amended states facts sufficient to constitute a cause of action. It alleges the execution of the contract which is set out in full. The contract consists of a lease for five years beginning October 1, 1902, and of an option allowing the lessees to purchase at any time during the term of the lease at a fixed price per acre. It further shows that the plaintiffs, being the lessees, had elected to buy the land in pursuance of the option, had made due tender of the price and demanded the execution of a deed which the defendant refused; that the contract was just, fair, and reasonable as to the defendant and that the price agreed upon was in fair proportion to the value of the property; that two clauses, to which the parties had agreed, to the effect that the plaintiffs were to allow improvements made by them during their possession to remain on the premises, in case they failed to exercise the option and buy, and that plaintiffs should pay the rent for the five years, if they did not sooner exercise the option, were by mutual mistake omitted from the contract, and that by like mistake a clause was inserted giving plaintiffs the right to remove such improvements if they did not purchase. The prayer was for the reformation of the contract and the enforcement of the defendant's agreement to sell. The mistakes alleged related entirely to the rights of the parties in the event that the plaintiffs did not buy under the option, but chose to occupy for the five-year term under the lease. If material to the case at all, it was only for the purpose of showing that the real contract made was fair, just, and reasonable, and, so far as the option was

concerned, supported by a valuable consideration. The facts alleged show the occurrence of a mutual mistake. We do not think there is any ambiguity or uncertainty in the complaint as amended. The contract, as written, was sufficiently certain on its face to support a suit for performance. The ambiguity as to the two repugnant clauses, the one allowing the removal of the improvements, the other requiring that they remain if the option was not exercised, did not make the contract uncertain as an agreement to sell. Furthermore, if it was uncertain in the condition in which it stood as originally executed, the uncertainties were all removed by the reformation which the court directed.

The defendant, in her answer, attempted to allege that the contract had been rescinded by her prior to the tender by the plaintiffs. The demurrer was properly sustained to this part of the answer. It did not aver an offer to repay the plaintiffs the moneys expended by them in improvements on the land, but only to repay the moneys "paid her by them" and "to restore everything received by her under that agreement." The complaint alleges the making of valuable improvements by the plaintiffs on the faith of the option to purchase. This special answer did not deny the making of these improvements and it cannot be said that the improvements had been "received" by the defendant. Hence, the offer to restore, as alleged in the answer, did not include an offer to compensate the plaintiffs for the moneys expended by them in improving the property and was insufficient to accomplish a rescission. Again, a party to a contract cannot rescind at his pleasure, but only for some one or more of the causes enumerated in section 1689 of the Civil Code. One seeking to rescind a contract, or to enforce a rescission which he claims he has effected in the manner provided in section 1691 of the Civil Code, must allege facts showing that he had good right to rescind, and for what cause a rescission had taken place, or that a rescission had been made by consent. (18 Ency. of Plead. & Prac., pp. 802, 803, 804.) The same rule controls where a rescission is averred as a defense. (18 Ency. of Plead. & Prac., p. 844; *Bruck v. Tucker*, 42 Cal. 353; *Miller v. Fulton*, 47 Cal. 146; *Dorris v. Sullivan*, 90 Cal. 286, [27 Pac. 216]; *Kentfield v. Hayes*, 57 Cal. 411; *Arguello v. Bours*, 67 Cal. 450, [8 Pac. 49]; *Swasey v. Adair*, 88 Cal.

182, [25 Pac. 1119].) The special defense does not aver any facts in regard to defendant's right to rescind and does not show a rescission by consent. It is therefore insufficient.

The court did not err in adjudging that the defendant should convey the land free from all liens and encumbrances. The contract provided that she should convey it free from all liens and encumbrances, "except such as may be created by the terms of this instrument as a lease of said premises." The conveyance of the property to the plaintiffs in fee would effect a complete merger of the two estates, and the lease would not thereafter be an encumbrance. The execution of the deed by the defendant would be a complete performance so far as the lease was concerned. The contract, as reformed, did not contemplate or provide that she should retain any right or interest under the lease after she had conveyed in pursuance of the option, even if it did not have that effect before reformation. The lease, therefore, did not constitute an encumbrance within the scope of the covenants in a grant deed. We cannot, upon these appeals, take notice of any liens for reclamation district taxes that may have accrued after the trial. The defendant, it may be observed, could have escaped that liability at any time by performing before the liens accrued. The statement in the record relating to the motion made by defendant to amend the judgment so as to except such liens, and the order denying the same, show that the judgment was entered before the motion and order were made. It was therefore an order made after final judgment and it cannot be reviewed on appeal from the judgment itself. The defendant did not appeal from the order. As to the liens for ordinary taxes, which may be presumed to have accrued between the time of plaintiffs' tender, in January, 1903, and the date of the entry of the judgment, in January, 1905, it is sufficient to say that the defendant, having refused to accept the money and make the deed as the judgment declares she should have done, is in no position to complain of the consequence of her own breach of contract.

After the last amendment of the complaint, defendant filed a cross-complaint to rescind and cancel the contract, as signed, on the ground that it was executed under a mistake as to its contents, induced by fraudulent representations of the plaintiffs. The mistakes so alleged were not the same as those

alleged in the amended complaint. Certain other conditions, it was alleged, were intended to have been inserted in the contract, but were omitted because of the fraudulent misrepresentations of the plaintiffs and the mistake of the defendant caused thereby. The court found that these allegations of the cross-complaint as to fraud and mistake were untrue, and the finding is sustained by the evidence. As it thus appears that there was no just ground for the rescission asked for, it is immaterial whether the court was right or wrong in its rulings concerning the admission of evidence relating to the circumstances attending the service of the notice of rescission. The notice itself was introduced in evidence and the time of its service was shown without conflict. This also disposes of the objection that the plaintiffs' offer of performance was made after the notice of rescission was served. As the cause of rescission as alleged did not exist, the defendant had no right to rescind and her attempt to do so did not affect the right of the plaintiffs to have specific performance.

Prior to the execution of the contract, the plaintiffs were occupying the lands under a previous lease, which, by its terms, did not expire until January 1, 1903. Inasmuch as there was no cause shown for a rescission, the plaintiffs had the whole of the term in which to exercise their option, and the question whether they were technically in possession of the premises under the new lease immediately upon its execution, or whether they continued to hold under the old lease until October 1, 1902, when the new term was to begin, is entirely immaterial. The new lease provided that the plaintiffs should have immediate possession, and could make any use of the land they saw fit. The prior lease forbids any waste or alterations without the lessor's consent. The plaintiffs, immediately after the execution of the new lease, and because of their having procured the option to purchase, began certain improvements which they would not have made under the old lease. They had the right to do this in reliance on the contract, and if the defendant desired to rescind the contract, and had the right to do so, she would have been required to compensate them for the improvements thus made.

In October, 1903, while the case was on trial and before the last amendment to the complaint was proposed or filed, the court refused to allow the defendant to introduce evidence

relating to a mistake in the terms of the agreement. This was not error. At that time, so far as the record shows, there was no issue upon the subject of mistake and the evidence was irrelevant.

The claim that there was no sufficient consideration to support the option, as a contract, is not sustainable. There was evidence to the effect that the plaintiffs agreed to pay rent at a higher rate than they considered it worth, because of the fact that they were obtaining an option. This rent was paid for one year in advance, the rent for the last three months of the old lease was canceled, and the rent accruing under the old lease from July 1 to October 1, 1902, although not due until January 1, 1903, was paid at the time of the execution of the new lease. All this constituted a sufficient consideration for the option.

Many other assignments of error are made by the appellant which are included in and disposed of by the foregoing conclusions. Other errors are urged but they are of so trivial a nature that we do not think it necessary to discuss them. They could not under any circumstances have been injurious to the defendant.

The judgment and order are affirmed.

Angellotti, J., Sloss, J., Henshaw, J., Lorigan, J., and McFarland, J., concurred.

A rehearing was denied, and the following modification in the decree was ordered by the court on petition for rehearing April 27, 1908:—

THE COURT.—Upon further consideration of this cause, pending an application for rehearing, we are of the opinion that, inasmuch as the plaintiffs, ever since January 14, 1903, have been in possession of the land, receiving all income, use, and profit thereof and being under no obligation to pay rent to the defendant after that date, it would not be equitable to compel the defendant to pay the taxes and other encumbrances created since that date and not made or suffered by her, or at her instance, or for her benefit. (See *Miller v. Corey*, 15 Iowa, 166; *Farber v. Purdy*, 69 Mo. 601; *Hall v. Denckla*, 28 Ark. 515; *Pomeroy v. Bell*, 118 Cal. 635, [50 Pac. 683]; *Miller v. Waddingham*, 91 Cal. 381, [27 Pac. 750].)

The opinion hereinbefore rendered, so far as it is contrary to this conclusion, is, to that extent, modified.

The judgment of the court below is modified by altering the clause providing for the execution of a deed by the defendant so that said clause shall read as follows: "Within fifteen days after notice of the entry of this decree make, execute and deliver to the plaintiffs, or to the clerk of the superior court for the plaintiffs, a deed conveying to the plaintiffs, their heirs and assigns, the premises hereinafter described, free from all liens and encumbrances *existing upon or against the same on January 14, 1903, or created thereafter by the defendant, or at her instance, or for her benefit.*"

As thus modified, and in all other respects, the judgment is affirmed. The appellant shall not recover costs of appeal herein.

[Sac. No. 1444. In Bank.—April 1, 1908.]

GREAT WESTERN GOLD COMPANY, Respondent, v.
JAMES J. CHAMBERS, Appellant.

APPEAL—ORDER REFUSING NEW TRIAL—QUESTIONS REVIEWABLE ON APPEAL.—Upon an appeal from an order denying a new trial, the appellate court is limited in its review of the action of the trial court to the grounds upon which such a motion may be based, and upon which the new trial was asked. Questions relating to the sufficiency of the complaint, rulings upon demurrers, and the sufficiency of the findings to support the judgment, cannot be considered on such an appeal.

ID.—FAILURE TO FIND—DECISION AGAINST LAW—GROUNDS OF MOTION FOR NEW TRIAL.—The failure of the trial court to make a finding of fact upon a material issue renders the decision one against law, and error in overruling a motion for a new trial made on that ground may be reviewed on appeal from the order. But in the absence of anything in the record to show that the motion for new trial was made on such ground, it cannot on appeal be presumed that it was.

ID.—NOTICE OF INTENTION—RECORD ON APPEAL.—It is not essential that the notice of intention to move for a new trial should be incorporated in the statement or bill of exceptions, but for purposes of review on appeal, it is essential that it should appear by the record that the ground for a new trial presented on appeal was presented

by the motion in the trial court. The record being otherwise silent upon the matter, this may be made to appear by proper specification of error in the statement or bill of exceptions; but the mere general specifications that the court erred in rendering judgment as it did are not sufficient to constitute such a showing.

ID.—AGENCY—ACCOUNTING—FINDINGS AS TO DAMAGES—JUDGMENT.—In an action against an agent for an accounting and for damages arising out of several alleged transactions, where the findings show the damages arising from a particular transaction in the sum of forty thousand dollars, and the amount of the further damages arising from the other transactions specifically alleged, a judgment rendered in favor of the plaintiff for the sum of forty thousand dollars, without anything by which the sum awarded can be made referable to any one or more of the particular transactions alleged, cannot be assailed for a failure to find upon an issue of fact.

ID.—FRAUDULENT OPTION TO PURCHASE TAKEN BY AGENT—LIABILITY OF AGENT FOR EXCESS OVER ACTUAL PURCHASE PRICE.—Where an agent, as the result of a fraudulent conspiracy between himself and the vendor, takes an option to purchase certain property for his principal for an amount in excess of the actual selling price agreed upon by him and the vendor, the principal, after acquiring knowledge of the facts, is not required to rescind, but may execute the option by paying the vendor the full purchase price expressed therein, and may hold the agent liable for the difference between the amount so paid and the price at which the property was actually acquired by the agent.

PLEADING—ACCORD AND SATISFACTION—RELEASE.—The defenses of accord and satisfaction and of release are affirmative defenses and must be pleaded by the defendant.

APPEAL from an order of the Superior Court of Shasta County refusing a new trial. Charles M. Head, Judge.

The facts are stated in the opinion of the court.

Charles A. Garter, and Milton S. Hamilton, for Appellant.

Pickel, Crocker & Tourtellot, Sweeney & Tillotson, George O. Perry, and Morrison, Cope & Brobeck, for Respondent.

ANGELLOTTI, J.—This is an appeal by defendant from an order denying his motion for a new trial.

The complaint as originally filed was for an accounting, and for judgment for such amount as should be found due plaintiff thereon. It was alleged that defendant as the agent and general manager of plaintiff in Shasta County, Cali-

fornia, received large sums of money for the transaction of the business of plaintiff, and for the purpose of purchasing for plaintiff certain mining properties, and failed to account for the same and converted a large portion thereof to his own use. Various transactions relative to the Vandevere group of mines, the Murray mine, and the Roan and Putney mines, whereby defendant improperly obtained from plaintiff and converted to his own use sums aggregating eleven thousand seven hundred dollars, were alleged. It was further alleged that on or about September 20, 1902, defendant, while acting as the agent and trustee of plaintiff, was directed to proceed to Salt Lake City and purchase or procure for plaintiff a contract for certain mines in Shasta County known as the Afterthought, for not exceeding one hundred and fifty thousand dollars; that acting under said instructions, defendant proceeded to Salt Lake City, and, for the purpose of defrauding plaintiff in the matter of said purchase, entered into an agreement and conspiracy with one Snyder and one Mitchell, whereby Snyder was to take the title to said mines from the owner, one Tarbet, for ninety thousand dollars, and Snyder was thereupon to give plaintiff an optional contract for the purchase for one hundred and fifty thousand dollars; that plaintiff, without knowledge of said conspiracy, accepted the contract from Snyder at the suggestion of defendant, and paid thereon to Snyder twenty thousand dollars as a first payment (ten thousand dollars of which was divided between defendant, Snyder, and Mitchell), the balance to be paid, ninety thousand dollars on September 20, 1903, and forty thousand dollars on March 20, 1904. During the trial, the complaint was amended by adding an allegation that thereafter plaintiff paid on said contract to Snyder the sum of one hundred and ten thousand dollars in full payment and discharge of the same, making in all the sum of one hundred and thirty thousand dollars paid thereon, whereby there was lost to plaintiff and plaintiff was damaged by reason of said fraudulent agreement and conspiracy in the full sum of forty thousand dollars. This allegation was apparently deemed denied. The trial court found in accord with the allegations of the complaint as thus amended, in regard to the Afterthought transaction, as well as in regard to the other transactions alleged, and, plaintiff waiving all claims except the right

to recover forty thousand dollars, rendered judgment against defendant for that sum.

This being simply an appeal from the order denying the motion for a new trial, some of the points made by learned counsel for appellant in their briefs cannot be considered. Upon an appeal from an order denying a new trial, the appellate court is limited in its review of the action of the trial court to the grounds upon which such a motion may be based (Code Civ. Proc., sec. 657), and upon which the new trial was asked. It is well established that questions relating to the sufficiency of the complaint, rulings upon demurrers, and the sufficiency of the findings to support the judgment, cannot be considered on such an appeal. (*Swift v. Occidental M. Co.*, 141 Cal. 161, [74 Pac. 700]; *Holmes v. Warren*, 145 Cal. 457, [78 Pac. 934]; *Brownlee v. Reiner*, 147 Cal. 641, [82 Pac. 324]; *County Bank v. Jack*, 148 Cal. 438, [113 Am. St. Rep. 285, 83 Pac. 705]; *Wheeler v. Bolton*, 92 Cal. 167, [28 Pac. 558]; *Brison v. Brison*, 90 Cal. 323, [27 Pac. 186].) The failure of the trial court to make a finding of fact upon a material issue renders the decision one against law, and error in overruling a motion for a new trial made on that ground may be reviewed on appeal from the order. (*Swift v. Occidental M. Co.*, 141 Cal. 161, [74 Pac. 700].) There is, however, nothing in the record to indicate that any such failure was a ground of the motion made in the lower court. The notice of intention to move for a new trial was not incorporated in the statement or bill of exceptions, and it was not essential that it should be, but it is essential to our right to review the action of a trial court on motion for new trial, that it should appear by the record that the ground for a new trial presented here was presented by the motion in the trial court. The record being otherwise silent upon the matter, this may be made to appear by proper specification of error in the statement or bill of exceptions (*Pico v. Cohn*, 78 Cal. 384, [20 Pac. 706]; *Williams v. Hawley*, 144 Cal. 99, [77 Pac. 762]); but manifestly the mere general specifications that the court erred in rendering judgment for plaintiff and against defendant are not sufficient to constitute such a showing. Upon the record before us, we cannot assume, for the purpose of reviewing the action of the trial court, that one of the grounds specified on the motion in the lower court was

that the decision was against law. Regardless of what we have said upon this point, however, it is not pointed out by counsel wherein the trial court failed to make a finding upon any material issue. The point in this connection appears to be that the judgment being only for forty thousand dollars, while the findings show not only the forty thousand dollars' damage arising from the Afterthought transaction, but also eleven thousand seven hundred dollars' damage arising from the other transactions specifically alleged, there is nothing by which the sum awarded can be made referable to any one or more of the particular transactions alleged. This clearly does not show a failure to find upon any issue of fact. Upon the record here, we are therefore limited to a consideration of the contention that the evidence was insufficient to support the material findings of fact, and the alleged errors of law committed by the trial court in ruling upon evidence. It is further clear that only those findings and alleged errors that are material to the Afterthought transaction need be considered here, for if the action of the trial court in regard to that matter was free from error, it is apparent that the judgment would have been the same as it is, even though the findings upon all the other matters had been in favor of defendant. (*Robinson v. Placerville etc. R. R. Co.*, 65 Cal. 266, [3 Pac. 878]; *White v. Douglass*, 71 Cal. 119, [11 Pac. 860].)

There is ample support in the pleadings and evidence for the findings in accord with the allegations of the original complaint as to the Afterthought transaction, and also for the findings in accord with the allegations of the amendment relative to the subsequent payment by plaintiff of the further sum of one hundred and ten thousand dollars in full payment of the amount due under the Snyder option, as reduced by stipulation of the parties. It is earnestly contended that the finding as to the damage resulting to plaintiff therefrom, which is as follows: "whereby there was lost to said plaintiff, and plaintiff was damaged by reason of said fraudulent agreement and conspiracy and acts upon the part of said defendant in the full sum of forty thousand dollars (\$40,000)," is not sustained by the evidence. This finding appears to have been attacked by proper specification of insufficiency of evidence to support it. The contention in this behalf is based on the fact alleged to have been shown by the evidence

that all the money paid to Snyder by plaintiff on account of such transaction, except the twenty thousand dollars, paid at the time of the giving of the option,—viz.: one hundred and ten thousand dollars,—was paid after plaintiff had obtained full knowledge of the fraudulent conspiracy between defendant, Snyder, and Mitchell; and it is also claimed that, although plaintiff to obtain the property covered by the option paid forty thousand dollars more than it would have paid if it had not been for the wrongful and fraudulent acts of its agent, if any injury was caused plaintiff in the matter, it was caused solely by the payment voluntarily made by plaintiff with full knowledge of all the facts. We are unable to see how defendant can be heard to assert that this loss was not caused by his wrongful acts. By reason of his willful and fraudulent breach of trust, plaintiff had accepted an option to purchase for one hundred and fifty thousand dollars property which it desired to acquire and for which it was willing to pay, if necessary, as much as that sum, when, as a matter of fact, the purchase price to the defendant was only ninety thousand dollars, and plaintiff, but for the fraudulent acts of defendant in regard thereto, would have been given an option to acquire the property for a consideration of ninety thousand dollars. If, by reason of such acts, it paid more than ninety thousand dollars for the property, it was necessarily damaged thereby to the extent of the difference between ninety thousand dollars and the sum actually paid. Admittedly, plaintiff, desiring to have the property, was not required to rescind upon discovery of the fraud. Nor was it required to resort to an action to compel a conveyance upon payment of ninety thousand dollars. Notwithstanding knowledge of the fraud on the part of plaintiff, the result of such action might be in some degree uncertain, and plaintiff was not required to take the chance of thus losing the opportunity of purchasing the property. It is not disputed that a party thus defrauded may upon discovery of the fraud complete his contract, and then maintain an action for the damages caused him thereby. Such damage in the case at bar, it appears very clear to us, was the amount of the difference between the price which plaintiff was required to pay to complete the contract and acquire the property, and the sum for which defendant and his confederates actually acquired the option. (See *King v. West*, 43

Cal. 628; *Colman v. Sarraile*, 142 Cal. 642, [76 Pac. 486].) It does not assist defendant, in his contention that the evidence is insufficient to sustain the finding of forty thousand dollars damage, that plaintiff obtained a reduction of twenty thousand dollars on the original price from Snyder, thereby reducing the amount of damage from sixty thousand dollars to forty thousand dollars. By the contrivance of defendant and for the purpose of enabling him to profit at the expense of his principal, the property which plaintiff desired to acquire had been placed within the control of Snyder, and plaintiff could not obtain the same without acceding to the demands of Snyder under the option given, except by resorting to an action against him to compel a conveyance, which might well turn out to be impracticable or without efficacy. This chance of losing the property it was not required to take. It had the clear right to pay Snyder the full amount of the one hundred and thirty thousand dollars that remained due on the option, and then maintain an action against the defendant for the sixty thousand dollars' loss which would thus have been caused, and the only effect of obtaining from Snyder a reduction of twenty thousand dollars on the amount to be paid to obtain the property, so far as the amount of damage caused by defendant's acts was concerned, was to reduce the amount of damage by twenty thousand dollars to defendant's benefit. It still remained that plaintiff was damaged by the acts of defendant in the sum of forty thousand dollars.

It is urged that the acceptance by plaintiff of the proposition of Snyder to accept twenty thousand dollars less than the amount originally named as the purchase price in the option, and the payment by it to Snyder of the one hundred and ten thousand dollars thereunder, had the effect to release the defendant from all liability for damages "upon the principles governing accord and satisfaction," and that in any event defendant was released from all claim of damage by what is said to have been a release of Snyder, a joint tortfeasor. It is not necessary to discuss on its merits either of these points, for it is clear that neither is available to defendant on this appeal. So far as the facts upon which defendant relies in this behalf are shown by the complaint as amended and the findings of the trial court, it is only necessary to

again state that the question of the sufficiency of the complaint and findings to support the judgment cannot be considered on an appeal from an order denying a new trial. Neither the defense of accord and satisfaction nor that of release, both of which are affirmative defenses, was pleaded by defendant in the lower court, and there is no finding of fact relative to the matter, other than the finding in accord with the allegations of the amendment to the complaint which we have already set forth. Except as to the damage thereby found to have been suffered by plaintiff by reason of defendant's acts, this finding was not attacked by any specification of insufficiency of evidence to sustain it, and the evidence shows it to be in accord with the undisputed evidence given on the trial.

Only three alleged errors in rulings on evidence are pointed out in appellant's briefs. The first two rulings claimed to be erroneous could not by any possibility have affected the result as far as the Afterthought transaction was concerned, and it is unnecessary to determine whether they were technically wrong. The third ruling was one excluding certain documentary evidence offered by defendant. The evidence so offered was clearly immaterial and irrelevant to any issue in the case, and the ruling of the lower court was correct.

The order denying a new trial is affirmed.

Shaw, J., McFarland, J., Lorigan, J., Henshaw, J., Sloss, J., and Beatty, C. J., concurred.

[S. F. No. 4355. In Bank.—April 1, 1908.]

H. MAY PEARSALL et al., Respondents, v. JAMES E. HENRY et al., Appellants.

SPECIFIC PERFORMANCE—CONTRACT FOR SALE AND EXCHANGE OF LANDS—MODIFICATIONS—SUBSTITUTED ORAL AGREEMENT—NOVATION—PART PERFORMANCE.—In an action for specific performance of a contract for the sale and exchange of lands, though an unexecuted oral modification of the original written contract cannot be enforced; yet, where it appears that the oral agreement was substituted by novation in the place and stead of a canceled written contract,

and that it provided different terms, and was fully performed on plaintiff's part, by conveyance of the lands belonging to him, he can enforce the substituted oral agreement according to its terms.

ID.—CONSTRUCTION OF CODE—SUBSTITUTED ORAL AGREEMENT NOT A MODIFICATION.—An oral agreement substituted by novation for a former written contract, is not an oral modification of the written contract within the meaning of section 1698 of the Civil Code, provided the substituted oral agreement is valid and enforceable.

ID.—STATEMENT OF FRAUD—PART PERFORMANCE—ACCEPTANCE OF CONVEYANCES FROM PLAINTIFFS BY DEFENDANTS—ESTOPPEL.—Where the only question is as to the validity of the substituted oral agreement under the statute of frauds, and it appears that the conveyance made by the plaintiffs to defendants was accepted under the new contract, notwithstanding the fact that it was agreed to be made under the former written contract, the defendants are estopped from claiming that such conveyance was not made in part performance of the terms of the substituted oral contract, and that the new contract was void under the statute of frauds.

ID.—EQUITABLE BASIS OF PART PERFORMANCE—PRIOR WRITTEN OBLIGATION.—The rule as to part performance of an oral contract for sale or exchange of lands, is based entirely on equitable considerations; and there is no hard and fast rule under which the existence of a prior written obligation bars all inquiry on the subject. It is sufficient that, under the circumstances of the particular case, the act of part performance is referable to the oral contract.

ID.—ORAL CONTRACT TO EXCHANGE LANDS—PART PERFORMANCE BY PLAINTIFFS—LEGAL DEFENSE—RULE IN EQUITY.—Where an oral contract for the exchange of lands has been performed by the plaintiff only, though the defendants would have a legal defense to an action against them on the contract, yet the rule in equity is that where there is an oral agreement by the terms of which each party is to convey lands to the other, a conveyance by one party on the faith of the agreement constitutes such part performance as will for the purpose of an action for specific performance take the whole case out of the operation of the statutes of fraud.

ID.—CONSIDERATION OF ORAL CONTRACT—SETTLEMENT OF DISPUTES.—A sufficient consideration for the oral contract appeared from evidence sustaining the finding of the court that it was based upon the existence and settlement of disputes between the parties.

ID.—EVIDENCE—WANT OF CONSIDERATION FOR WRITTEN CONTRACTS—SUPPORT OF PLEADING.—Where the defendants in their cross-complaint relied upon the previous written contracts, the plaintiffs in support of their answer to the cross-complaint, were properly allowed to introduce evidence as to a want of consideration therefor.

ID.—ORAL EVIDENCE TO EXPLAIN AMBIGUITY.—Oral evidence was admissible to show all the circumstances surrounding the parties at the time of the execution of a written contract, by way of explaining ambiguous clauses therein.

ID.—EVIDENCE—SUBSTITUTED ORAL AGREEMENT.—Evidence was admissible to show that the oral agreement relied upon by plaintiffs was substituted for the prior written contract to settle disputes arising thereunder.

ID.—PART PERFORMANCE A QUESTION OF FACT—PROVINCE OF TRIAL COURT—SUPPORT OF FINDINGS.—The question whether there has been a part performance of an oral contract on the part of the plaintiff, is one of fact to be determined by the trial court; and the question as to the credibility of witnesses, in case of conflicting evidence, is within the exclusive province of the trial court, and its findings must be deemed in such case supported by the evidence and will not be disturbed upon appeal.

ID.—FINDING AGAINST EVIDENCE—AMOUNT OF INCIDENTAL EXPENSE—AVOIDANCE OF NEW TRIAL—CONSENT TO MODIFICATION OF JUDGMENT.—Where it appears that a finding as to the amount of incidental expense allowed by the court is not sustained by the evidence, and to avoid a new trial on that particular question, the respondents' offer to remit the whole amount allowed from the judgment, the judgment will be modified in that respect, and the order denying a new trial will be affirmed, and the judgment as modified affirmed, at appellants' costs.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Frank J. Murasky, Judge.

The facts are stated in the opinion rendered in Bank and in Department One.

Louis Titus, H. M. Wright, and Titus, Wright & Creed, for Appellants.

Page, McCutchen & Knight, *Amici Curiae*, also for Appellants.

Campbell, Metson & Campbell, J. N. Gillett, Philip Mansfield, and Thomas H. Breeze, for Respondents.

THE COURT.—A rehearing of this appeal was ordered after decision in Department. Upon further consideration, we adhere to the Department opinion. As stated therein, section 1698 of the Civil Code must be held to be inapplicable where the offer is to prove a substitution of a new agreement for the prior written agreement. This is very clearly shown in the opinion in *Guidery v. Green*, 95 Cal. 630, [30 Pac.

786], where it was held that one sued upon a written agreement could show by parol evidence that a subsequent written agreement was executed upon the consideration and agreement between the parties that the former agreement should be canceled, and all claims of the plaintiff against the defendant thereunder waived. Speaking of such evidence, the court said: "Its purpose was to show that that agreement had been canceled by mutual consent, and had no longer any operative effect. Such evidence is as admissible as is oral testimony that the terms of a written agreement have been fully performed by the parties, or that the instrument evidencing such agreement has itself been canceled and destroyed by the concurrent act of both parties. In either case the object and effect of such evidence is not to change any of the terms of the contract, but to show that the contract has no longer any existence, and therefore cannot be made the basis of an action. The objection that the written agreement could be altered only by an agreement in writing, or by an executed oral agreement (Civ. Code, sec. 1698) has no application to the facts offered to be shown. The offer was to show that the subsequent written agreement had been substituted for the original agreement, and the oral agreement of which proof was offered was the agreement to make this substitution. It was not an offer to prove an executory oral agreement, but an oral agreement that had been fully executed by the substitution. This, in effect, was an offer to prove a novation. (*Farmers' N. G. Bank v. Stover*, 60 Cal. 387.)" (See, also, *Adler v. Friedman*, 16 Cal. 138.) It is true that to effect a substitution the new agreement must be valid in itself (*Adler v. Friedman*, 16 Cal. 138), and, solely by reason of the statute of frauds, the new agreement was one that was required to be in writing in order to be valid. But the objection on this score is fully answered by what is said in the Department opinion on the effect of the performance of Pearsall of his part of the contract, the conveyance to the defendants of the Del Norte County lands. Having accepted such conveyance under the new contract (which is the effect of the findings of the trial court), the defendants are no longer in a position to raise the objection that such new contract was not in writing. We do not understand the authorities relied on by learned counsel for defendants to hold that

the mere fact that the act relied on as part performance was something which the party performing had been obligated to do under a prior agreement is conclusive against the claim of part performance of the new oral agreement. Some of them say that to constitute part performance the acts relied on must be referable exclusively to the oral contract (see Page on Contracts, sec. 719), but as we understand it this means no more than in the light of all the circumstances of the particular case such acts are so referable. There is no hard and fast rule under which the mere existence of a prior obligation to do the acts bars all inquiry on the subject. The rule as to the effect of part performance is based entirely on equitable considerations, and when it is clearly and unequivocally made to appear that there has been a performance by a party of his part of an oral agreement required by the statute of frauds to be in writing, under such circumstances as to make it inequitable to allow the other party receiving the benefit thereof to repudiate it on the ground that it was not in writing, he is estopped from doing so. The question whether there has been a part performance of the oral agreement is necessarily one of fact to be determined by the trial court. If the testimony of plaintiffs' witnesses be taken as true, as to which the trial court was the sole judge, it affords unequivocal and satisfactory evidence of the particular oral agreement alleged by Pearsall, and showed acts of part performance referable exclusively, under all the circumstances, to such oral agreement. The findings of the trial court sufficiently show a consideration for the oral contract in the existence of the disputes between the parties and the settlement thereof, and there is sufficient evidence to sustain such findings.

In Department it was held that the evidence was insufficient to support the finding as to the amount of incidental expenses incurred by Pearsall in acquiring the Del Norte County lands, and for which, under the oral contract, he was entitled to reimbursement. The trial court found this amount to be \$4,650, and included such amount, with interest from July 1, 1901, in the judgment. The judgment of this court was that the judgment and order be reversed, with directions to the trial court to retry only the issues regarding the expenditures on account of such incidental expenses, and to

enter judgment in favor of H. May Pearsall for the amount, if any, found to have been so expended, together with the amounts due by reason of the other findings. Plaintiffs for the purpose of obviating any further proceedings, have filed in this court their waiver of any further claim on account of such incidental expenses, and their consent that the judgment be modified by deducting therefrom the said amount of four thousand six hundred and fifty dollars, with interest thereon from July 1, 1901, leaving plaintiff, H. May Pearsall, entitled at the date of the judgment (April 22, 1904) to the sum of \$46,443.11, with interest from said date at the rate of seven per cent per annum, and costs of suit taxed at \$189.55. This obviates the necessity of a new trial.

The order denying the motion for a new trial is affirmed. The judgment is modified by inserting the amount of \$46,443.11 as the amount which plaintiff H. May Pearsall shall receive, in lieu of the \$51,876.95 awarded, and as so modified, said judgment is affirmed as of its original date. Defendants shall recover the costs of this appeal.

Beatty, C. J., dissented.

The following is the opinion rendered in Department One, November 10, 1907, adhered to in the foregoing.

SLOSS, J.—This action was brought by Clarence E. and H. May Pearsall, husband and wife, against James E., George E., John H., and Charles B. Henry, copartners under the firm name of J. E. Henry & Sons. The complaint alleges that the plaintiff Clarence E. Pearsall during the months of February, March, and April, 1901, purchased a tract of redwood timber land in Del Norte County in this state, and paid thereon as part of the purchase price and for securing the title the sum of \$39,009.61, six thousand four hundred dollars of which belonged to his wife, H. May Pearsall; that the said Clarence E. Pearsall also expended as incidental and necessary expenses in purchasing said lands the further sum of five thousand dollars, or thereabouts. It is alleged that on or about the twenty-third day of April, 1901, the defendants promised and agreed with the plaintiffs that if the plaintiffs would convey said lands to them, they, the defendants, would in the latter part of May, 1901, pay to plaintiffs the money they

had paid upon such lands as aforesaid, and the moneys expended by Clarence E. Pearsall as expenses in obtaining the same. It is then averred that the plaintiffs, relying upon this promise, conveyed all of said lands to the defendants, but that said defendants have failed and refused to pay any part of said moneys to plaintiffs. The complaint sets forth an assignment by Clarence E. Pearsall to H. May Pearsall of all his right, title, and interest in and to said sums of money, and asks judgment against the defendants for the amounts so alleged to have been paid for securing the lands and for expenses.

The defendants answered, denying among other things the making of the alleged agreement, and denying that the lands had been conveyed to them pursuant to any such agreement. The position of the defendants is clearly set forth in their pleadings, which include, in addition to an answer, a counterclaim and a cross-complaint. They allege that the conveyance set forth in the complaint had been made pursuant to the terms of two written agreements between the defendants and the plaintiff Clarence E. Pearsall. The first of these bears date the twentieth day of October, 1900, and after reciting that the parties of the first part (the appellants herein) contemplate purchasing from the California Redwood Company a tract of land in the county of Humboldt containing 16,800 acres, or thereabouts, at the price of thirty dollars per acre, and that said California Redwood Company has promised to Pearsall a commission of $2\frac{1}{2}$ per cent on said price for making said sale, declares that the Henrys agree that in the event of their purchasing the said tract of land from the California Redwood Company, they will sell to Pearsall at the price of forty thousand dollars an interest in the tract bearing such relation to the whole tract as forty thousand dollars bears to the entire purchase price, less the commission. By this agreement Pearsall agrees to purchase said interest and that he "will in addition pay said parties of the first part any and all commission he may receive from the California Redwood Company." This agreement, considered by itself, had no reference to the lands mentioned in the complaint herein, but it was supplemented by the making of a second agreement dated February 8, 1901, which provides that "in consideration of certain favors extended to the

party of the first part (Pearsall) by the party of the second part (J. E. Henry & Sons) in the purchase of redwood timber lands in the county of Humboldt, the party of the first part hereby agrees to purchase for the party of the second part certain redwood timber lands in the county of Del Norte, in the state of California," in certain described townships and sections. The agreement goes on to recite that Pearsall has already secured options on the lands which the parties of the second part expect to purchase, and that papers in escrow are lodged in bank, and provides that Pearsall is to make out a list showing the above tracts of land on which he has options, together with the names of the owners and number of acres contained in each tract, and the price per acre which the several owners are to receive for their lands. On such tracts as the purchase price is fifteen dollars per acre or under, Pearsall is authorized by J. E. Henry & Sons to purchase, paying for same the prices agreed upon between the present owners and Pearsall, but Pearsall is not to buy any of the tracts of land mentioned for a price exceeding fifteen dollars per acre, without special instruction from the Henrys, "all deeds to be made in the names of the parties of the second part, who are to pay the prices at which the lands are now deeded in escrow." The Henrys agree to furnish Pearsall necessary funds to secure the different tracts. The parties of the second part further agree to pay the expenses of the party of the first part while he is engaged in securing the deeds provided for, said expenses not to exceed two hundred and fifty dollars. It is the purchase of the land in Del Norte County, described in this agreement of February 8, 1901, that gives rise to the present controversy.

In the pleadings on the part of the defendants, it is alleged that in December, 1900, they purchased the 16,800 acres of land in Humboldt County mentioned in the agreement of October, 1900, and that Pearsall received as a commission for making such sale the sum of eighty-nine thousand dollars. This is alleged to be far in excess of any sum paid by Pearsall for the lands purchased by him under the contract of February, 1901. By their counterclaim the defendants ask judgment against Pearsall for the excess, and by their cross-complaint they seek an accounting of the balance of com-

missions that may remain in Pearsall's hands. The cross-complaint also seeks to compel the conveyance of 320 acres of land claimed to be a part of the tract purchased by Pearsall for the Henrys, and by Pearsall conveyed to J. N. Gillett, who is made a party defendant to the cross-complaint.

The answer to the cross-complaint does not deny the execution of the written instruments in question, but alleges that these instruments were executed by Pearsall without consideration; alleges that after the making of these agreements differences had arisen between Pearsall and the defendants regarding their rights and obligations arising out of their several contracts and that subsequently Pearsall and the Henrys entered into a new agreement for the purpose of settling all of the matters in controversy, and that by this new contract it was agreed that the plaintiffs were to convey to the defendants all of the lands secured by Pearsall, and that the defendants should pay to the plaintiffs all sums of money paid by them for the purchase of lands in Del Norte County, and the expenses incurred in securing the same. The defendants also agreed, as is alleged, to waive all claims which they had for commissions received by Pearsall on the sale of the lands in Humboldt County purchased from the California Redwood Company, except $2\frac{3}{4}$ per cent of the purchase price, which had heretofore been paid by Pearsall to the defendants. Plaintiffs allege that their conveyance of the land in Del Norte County was made in reliance upon this agreement.

From this summary of the pleadings it will be seen that there is no controversy about the fact that plaintiffs did convey to defendants the land in Del Norte County. The real dispute is as to the agreement under which this conveyance was made, the defendants claiming that it was made by virtue of the written agreement above described, and the plaintiff contending that these written agreements were abrogated and superseded by a new and different agreement. More specifically, the difference between the parties relates to the commissions to be paid by Pearsall to the Henrys upon the sale of the lands in Humboldt County. If, as claimed by the plaintiffs, only $2\frac{3}{4}$ per cent of the purchase price paid on the Humboldt transaction was to be turned over, defendants are largely indebted to the plaintiffs. On the other hand,

if, as is contended by the defendants, Pearsall was bound to account to them for the total commission amounting to eighty-nine thousand dollars, this amount was sufficient to repay him for all advances made in acquiring the Del Norte lands, and to leave a large balance due from him to the defendants.

The findings and judgment were in favor of the plaintiffs. So far as concerns the conveyance of the Del Norte lands to defendants the court finds that the written agreements of October 20, 1900, and February 8, 1901, respectively, were executed as alleged in the answer and cross-complaint; that between the first day of February, 1901, and the twenty-third day of April, 1901, the plaintiff, Clarence E. Pearsall, purchased in his own name and partially paid for from his own funds, a tract of redwood timber land, situated in Del Norte County, containing 8115 acres, that he expended in purchasing said land the sum of four thousand six hundred and fifty dollars for expenses, and \$39,009.61 on account of the purchase price, the cost of said land to him having been \$12.50 per acre, exclusive of expenses. It is found that Pearsall received eighty-nine thousand dollars as commissions on the sale of the 16,800 acres of Humboldt land, and that of this sum fourteen thousand dollars had been paid to defendants. It is further found that in the month of April, 1901, disputes arose between Pearsall and the defendants growing out of their written agreements, Pearsall claiming that the agreement of February 8, 1901, had been obtained from him by fraud, and the defendants claiming that they were entitled to the lands purchased by Pearsall at the exact price paid for the same, without allowing any commission or expenses, which claim was by said Pearsall denied, he claiming that the defendants were to pay \$15.20 per acre for said lands. The defendants also demanded that said lands be immediately deeded to them, Pearsall claiming that there should be no conveyance until he had been paid at the price of \$15.20 per acre. The finding as to the new agreement upon which this suit is founded is in the following words: "That upon the 23d day of April, 1901, plaintiff, Clarence E. Pearsall, and the defendant, James E. Henry, representing the firm of J. E. Henry & Sons, met in the city of Eureka, state of California, and made a full and complete verbal settlement of all accounts existing between

them as follows: Said James E. Henry, for said J. E. Henry & Sons, agreed with said Pearsall that for and in consideration of said Pearsall waiving all claims and demands against defendants over and in excess of \$12.50 per acre upon the lands which had been purchased by him, to wit, the 8115 acres in the county of Del Norte, state of California, and deeding said lands at once to defendants, that defendants would faithfully carry out the terms of the agreement of October 20, 1900, in relation to deeding said Pearsall the amount of said lands represented by his \$40,000 purchase as shown by said agreement; that the defendants would waive any and all claims to any commissions under said agreement, save and except $2\frac{3}{4}$ per cent which defendants had theretofore received, and would repay said Pearsall the entire amount of money he had paid out of his own and his wife's funds in the purchase price of said 8115 acres of land in Del Norte County aforesaid, and would repay said Pearsall any and all expenses he had incurred in the purchase of said lands, and that said defendants would pay said sums of money on or about the first day of June, 1901. That said Pearsall accepted the terms of said agreement and fully agreed thereto." The court found that Pearsall made the conveyance as provided in said agreement; that no part of the moneys paid by him for said lands or expenses incurred by him has been repaid; that he had transferred his claim against defendants to his co-plaintiff, H. May Pearsall, and directed judgment in favor of H. May Pearsall for the sum of \$43,650.61, with interest, the total amounting, at the date of the findings, to \$51,876.95. Judgment for this amount and costs followed, and the defendants appeal from the judgment and from an order denying their motion for a new trial.

Many of the findings of the court are attacked as unsupported by the evidence. Before proceeding to the examination of these points, we shall consider the contention of the appellants that the findings, even if sustained by the evidence, do not support the judgment. The argument in this regard is based primarily upon the proposition that the alleged agreement of April 23, 1901, by virtue of which the parties settled all of their then existing differences, and agreed upon an immediate conveyance by Pearsall of the lands, was void and unenforceable because not in writing.

The defendants urge that this oral agreement of April 23d was a mere modification or alteration of some of the terms of the agreements of October, 1900, and February, 1901, and since it was still executory was void under the provisions of section 1698 of the Civil Code. That section reads as follows: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." According to section 661 of the Civil Code, an executed agreement is one "the object of which is fully performed. All others are executory." If the agreement of April 23, 1901, is to be regarded as a mere modification or alteration of the then existing agreements, it must be conceded that it was not executed within the meaning of section 1698, and is therefore not now enforceable. An oral agreement altering a written agreement is not executed unless its terms have been fully performed. Performance on the one side is not sufficient. There must be a complete execution of the obligations of both parties in order to bring the modification within the terms of the statute. (*Henahan v. Hart*, 127 Cal. 657, [60 Pac. 426]; *Thompson v. Gorner*, 104 Cal. 168, [43 Am. St. Rep. 105, 37 Pac. 900]; *Platt v. Butcher*, 112 Cal. 634, [44 Pac. 1060]; *Mackenzie v. Hodgkin*, 126 Cal. 591, [77 Am. St. Rep. 209, 59 Pac. 36]; *Harloe v. Lambie*, 132 Cal. 133, [64 Pac. 88].)

But we think the agreement of April 23, 1901, as the same is found by the court, was not a modification or alteration of the written agreements, but was a new agreement superseding those then existing. The finding which has already been quoted at length does not indicate that the parties intended to alter one or more of the terms of the written agreements, leaving those agreements in other respects to remain in force. The idea conveyed by the finding is that these agreements were virtually abrogated, and that the new oral agreement was to take their place. It imposed new obligations upon the parties and each, in consideration of new promises then made by the other, agreed to do acts which, according to his own contention, he was not then bound to perform. To such new agreement, substituted for an existing written agreement, section 1698 of the Civil Code has no application. (*Stockton etc. Works v. Glenn's Falls Ins. Co.*, 121 Cal. 167, 175, [53 Pac. 565]. See, also, *Adler v. Friedman*, 16 Cal. 139.)

But it is urged by appellants that even if the agreement of April 23, 1901, is not to be treated as an unexecuted oral modification of a written agreement, it is still, as an oral agreement for the sale of real property, invalid under subdivision 5 of section 1973 of the Code of Civil Procedure. Unquestionably this agreement which provided for the conveyance by plaintiffs of the eight thousand odd acres of land in Del Norte County, and the transfer by defendants of an undivided interest in the lands in Humboldt County, was an agreement which, by the provisions of the statute of frauds, was required to be in writing. But where the plaintiffs have, as it is here found they have, fully executed the agreement on their side, are the defendants in a position to raise the objection that the contract was not in writing? While full performance of so much of the contract as would bring it within the statute of frauds will enable either party to sue upon the remaining stipulations (Browne on Statute of Frauds, 5th ed., sec. 117) the statute will still prevent recovery when any stipulation which is itself required to be in writing remains unperformed. Here the contract as found required the defendants to convey an interest in the Humboldt lands. This stipulation being unperformed, and the contract being undoubtedly entire, the rule as just stated would make the bar of the statute applicable to any suit upon said contract. (*Fuller v. Reed*, 38 Cal. 100.) But this rule refers merely to the effect of the statute as a legal defense. Notwithstanding the applicability of the statute as a bar at law, there may still have been such part performance as will impel a court of equity to specifically enforce the contract. Where there is a verbal agreement under which each of the parties is to convey land to the other, it is generally held that a conveyance by one on the faith of the agreement constitutes such part performance as will in equity take the case out of the operation of the statute. (*Caldwell v. Carrington*, 9 Pet. 86; *McClure v. Otrich*, 118 Ill. 320, [8 N. E. 784]; *Farwell v. Johnston*, 34 Mich. 342; *Baker v. Scott*, 2 Thomp. & C. (N. Y.) 606. See *Swain v. Burdett*, 89 Cal. 564, 569, [26 Pac. 1093].) The case at bar is within the principle of these decisions, and the conveyance by plaintiffs therefore places them in a position to compel compliance by the defendants with the undertakings on their part.

It is further argued that the conveyance by plaintiffs cannot be treated as a part performance of the alleged oral agreement of April 23d, upon the ground that acts claimed to constitute a part performance must clearly appear to have been done with a view to carrying out the oral contract relied upon. (Browne on Statute of Frauds, 5th ed., sec. 454; *Williams v. Morris*, 95 U. S. 456; *Blum v. Robertson*, 24 Cal. 142; *Foster v. Maginnis*, 89 Cal. 264, [26 Pac. 828].) But whether or not the acts do so clearly appear to have been done is primarily a question of fact for the trial court, and the trial court here has found that the conveyance to the defendants was made pursuant to the oral agreement of April 23d. This is sufficient to meet the requirements of the rule. We are satisfied that if the evidence sustains the findings of the court those findings were properly held to result in the judgment entered.

Are the findings sustained by the evidence? The principal attack is directed against the finding of the making of the oral agreement of April 23, 1901. The appellants make an elaborate argument with a view to showing that the conveyance by Pearsall was made in recognition of his obligations under the written agreement of February, 1901, and that no oral agreement, as claimed by the plaintiffs, and found by the court, was in fact entered into. It is not to be denied that there are certain circumstances appearing in the record which lend support to this contention. Apart from the suspicion which must always attach to a claim that a formal agreement in writing has been superseded by an oral contract, much more favorable than the writing to the party who asserts the making of the new agreement, Pearsall's own testimony was greatly shaken by the production of letters in which he had made statements entirely at variance with his position at the trial. But his testimony as to the making of the agreement of April 23d was corroborated by several witnesses, and the degree of credit to be accorded to him, as to the other witnesses, was a question for the trial court. The witnesses for the plaintiffs testified that the agreement in question had been made. The witnesses for the defendants testified that it had not been. It was for the trial court to decide which set of witnesses was telling the truth. While it may be that the court reached the wrong conclusion on this question of fact, its decision is conclusive in this court, if

there was a substantial conflict of evidence, and it cannot be doubted that there was such conflict here.

It is found that Pearsall had expended in purchasing the lands and securing the options the sum of four thousand six hundred and fifty dollars as necessary and incidental expenses. The only testimony as to these expenses is that of Pearsall himself. Adding together all of the items testified to by him, the sum falls considerably short of the amount found by the court to have been expended by him. Indeed, the respondents make no attempt to point out any evidence which will sustain the finding that \$4,650 was so expended.

The findings as to the amount paid out by Pearsall on account of the purchase price of the land are by no means satisfactory when measured by the evidence. The court made two findings relating to this item. Finding VIII is that Pearsall had paid upon the purchase price of the land the sum of \$39,009.61. Finding IX declares that the actual cost of said lands to Pearsall had been the sum of \$12.50 per acre, exclusive of expenses. The record discloses absolutely no evidence in support of the latter finding. Nowhere in the testimony is there any suggestion of a price of \$12.50 per acre. Pearsall and those from whom he claims to have bought, all say the price to him was twelve dollars per acre. But since the ultimate and important question in this connection is how much Pearsall had expended in purchasing the land, an error in the finding as to the price per acre is of no consequence, if finding VIII that he had expended \$39,009.61 is supported by the evidence. We think the record does contain sufficient evidence to support this finding, although that evidence is not as clear as might be desired. Pearsall testified that he had bought and paid for the 8115 acres at the rate of twelve dollars per acre. The amount so claimed to have been expended, after deducting advances made by the defendants and fourteen thousand dollars due them (according to Pearsall's contention) on account of commissions, left a sum greater than that found by the court to have been expended by Pearsall. While it is difficult, if not impossible, to ascertain from the evidence how the court arrived at the exact figure of \$39,009.61, there was some evidence, not directly contradicted, tending to show that that amount, or more, had been expended by Pearsall.

The other findings, so far as they are material, are supported by sufficient evidence.

We come to the exceptions taken to the rulings of the court in sustaining and overruling objections to evidence. There are more than one hundred of these exceptions, and they must necessarily be treated briefly. Many of them are based on the action of the court in admitting correspondence, and evidence of conversations of the parties, prior to the agreement of February 8, 1901. It is urged that this violated the rule that the execution of a written contract supersedes all negotiations preceding its execution. (See Civ. Code, sec. 1625.) But here the plaintiffs in their answer to the cross-complaint averred that the two written agreements relied on by the defendants had been executed by Pearsall without any consideration whatever. That want of consideration for the execution of a writing, when properly pleaded, may always be shown by parol proof, is elementary, and the testimony in question was relevant to the issue framed.

Testimony of the oral agreement of April 23, 1901, was objected to on the ground that it was an oral unexecuted modification of a written agreement. That objections of this character were properly overruled follows from what has been said in discussing the sufficiency of the findings to support the judgment. If, as is shown in an earlier part of this opinion, the agreement of April 23, 1901, constituted, not a modification of the written agreements, but a new contract superseding them, oral evidence of such new contract was competent.

Pearsall was allowed to testify to the conversations which took place between him and some of the defendants at the time of signing the contract of October 20, 1900. This conversation related to the provision for turning over the commissions to be received by him on the Humboldt sale, and the purpose of the testimony was to show that the understanding was that only $2\frac{1}{2}$ per cent of the purchase price, and not the entire commission, was to be accounted for. There was no error in this. The writing which recited that the commission was to be $2\frac{1}{2}$ per cent, and then contained an agreement to pay over all commissions, was ambiguous. Whether by its terms Pearsall was to turn over only the $2\frac{1}{2}$

per cent stated to be the amount shown, or was to turn over all commissions, whatever might be their amount, was fairly open to doubt. To clear up this ambiguity, which appeared, when it was shown that the commissions were in fact much more than $2\frac{1}{2}$ per cent, it was proper to allow the plaintiffs to show the circumstances surrounding the execution of the writing, and all that was said in regard to these clauses. (*Balfour v. Fresno etc. Co.*, 109 Cal. 221, [41 Pac. 876].)

Some of the testimony offered to show what money had been paid by Pearsall through a bank in Crescent City was immaterial because not directly connected with the transactions in dispute. But we cannot see that the admission of this evidence was in any substantial way prejudicial to appellants. The most that can be said is that it had no tendency to support the claim of Pearsall as to the amount expended by him in the purchase of the lands. If it had no such tendency its admission was not a matter of sufficient importance to justify a reversal.

The exceptions taken in connection with the testimony regarding Pearsall's expenses in acquiring the land need not be considered in view of our conclusion that the evidence does not support the finding as to such expenses.

On the whole case we find no substantial error except that involved in the finding just mentioned. Since this does not affect the other issues, it will not require a retrial of the entire case. (*Emerson v. Yosemite G. M. Co.*, 149 Cal. 50, [85 Pac. 122]; *Robinson v. Muir*, 151 Cal. 118, [90 Pac. 521].)

The judgment and order are reversed and the cause remanded with directions to the trial court to retry the issues raised regarding the expenditures made by C. E. Pearsall on account of incidental expenses in purchasing the lands mentioned in the complaint, and to enter a judgment in favor of H. May Pearsall for the amount, if any, found to have been so expended, together with the amounts due by reason of the other findings.

Shaw, J., and Angellotti, J., concurred.

Rehearing denied.

Beatty, C. J., dissented from the order denying a rehearing.

[S. F. No. 4582. In Bank. April 2, 1908.]

In the Matter of the Estate of THOMAS BELL, Deceased.
TERESA BELL, Widow, Respondent; LOUISA J.
THOMPSON et al., Appellants.

ESTATES OF DECEASED PERSONS—FAMILY ALLOWANCE BEFORE INVENTORY—CESSATION.—An order for a family allowance made before the return of the inventory, to commence from the death of the husband, and to continue until further order of the court, ceased to be operative from the date of such return, and no further payments could be allowed under such order.

ID.—PAYMENTS MADE BEFORE ORDER REDUCING ALLOWANCE—CONTEST—APPEAL—ADJUDICATION AGAINST INTERVENING ORDER.—Where payments made to the widow at the rate of the former allowance after the return of the inventory, prior to a subsequent order reducing the allowance were contested, and disallowed upon appeal, on the ground that there was no intervening order, the judgment upon appeal is an adjudication against the existence of any intervening order.

ID.—INTERVENING ORDER NOT ENTERED—NUNC PRO TUNC ENTRY—IGNORANCE OF WIDOW—SHOWING NOT PERMISSIBLE—RES ADJUDICATA.—It cannot be shown to defeat the adjudication by this court that there was no intervening order, that there was in fact such an order containing the same allowance procured by the executrix from the date of the inventory, which was not entered in the minutes of the court, through inadvertence of the clerk, and the existence of which was not known to the widow at the time of the former contest and appeals, and which she afterwards as administratrix procured to be entered *nunc pro tunc*, as of the date of the inventory, to justify the contested payments disallowed upon appeal.

ID.—DIFFERENCE IN CAPACITY IMMATERIAL.—The fact that the widow appeared in her individual capacity upon the former appeal, and that the *nunc pro tunc* order under which the court again made the allowances, which were disallowed upon the former appeal, was procured by her in her subsequent capacity as administratrix, is immaterial, and cannot affect the conclusiveness of the judgment upon appeal, against the existence of the intervening order, which involved only her individual rights as widow to the family allowance.

ID.—EFFECT OF JUDGMENT AS RES ADJUDICATA—NEW EVIDENCE.—A final judgment is conclusive not only as to matters judicially determined, but also as to every matter that might have been litigated; and the subject-matter involved cannot be re-litigated, in a subsequent proceeding, on the ground of newly discovered evidence.

APPEAL from an order of the Superior Court of the City and County of San Francisco directing payments to the

widow of a deceased person on her family allowance. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

James M. Allen, Drown, Leicester & Drown, Garret W. McEnerney, W. B. Bosley, John S. Drum, and Maurice V. Samuels, for Appellants.

T. Z. Blakeman, for Respondent.

LORIGAN, J.—This is an appeal by some of the creditors of the estate of Thomas Bell, deceased, from an order of the probate court entered in said estate on February 24, 1905, *nunc pro tunc* as of May 1, 1894, directing that a family allowance of two thousand dollars a month continue to be paid from June 17, 1893, to Teresa Bell as widow of said deceased till the further order of the court, and from a judgment and order that a balance due her under said *nunc pro tunc* order of \$32,665.80 be paid her from the estate of said deceased.

A clearer understanding of the point involved in this appeal may be had by a preliminary statement of certain conceded facts.

Teresa Bell is the widow of Thomas Bell, who died October 16, 1892, and whose will was admitted to probate. On January 12, 1893, on petition of the said widow an order of court was made for a family allowance of two thousand dollars a month payable to her commencing from the date of the death of decedent till the further order of the court. The inventory in the estate was filed June 17, 1893. On October 14, 1895, the court made an order reducing the family allowance from two thousand dollars to fifteen hundred dollars a month, and on May 4, 1898, made still another order reducing said family allowance to one hundred dollars a month. On March 24, 1900, the powers of the executor of deceased—George Staacke—were suspended, subsequently revoked, and said Teresa Bell appointed special administratrix. After the order revoking his letters was on the appeal of said executor affirmed by this court (*Estate of Bell*, 134 Cal. 194, [67 Pac. 123]), said Teresa Bell was appointed administratrix with the will annexed of said estate. She

subsequently, on February 10, 1902, filed her account as special administratrix in which she credited herself with payments of family allowance which she claimed were due and unpaid between June 17, 1893, and October 14, 1895. These items of credit were contested by the creditors of the estate, on the ground that no order for a family allowance prior to the order of October 14, 1895, except the order of January 12, 1893, was made; that the latter order became null and void on the return of the inventory of the estate on June 17, 1893, and that all the installments of family allowance accruing prior to June 17, 1893, had been paid her by the executor of the estate. The probate court overruled these objections of the creditors and settled said final account of said Teresa Bell as special administratrix with said credits for family allowance after the return of said inventory and up to October 14, 1895, sustained and allowed. The creditors appealed from said order and this court reversed it, holding (and this is all that it is necessary to be stated now) that the order of January 12, 1893, directing that a family allowance be paid, ceased to operate on the return of the inventory on June 17, 1893; that as the only order made subsequent to said June 17, 1893, was the order of October 14, 1895, the court erred in crediting said Teresa Bell with all items for family allowance under the order of January 12, 1893, subsequent to the return of said inventory and prior to the order of October 14, 1895. (*Estate of Bell*, 142 Cal. 97, [75 Pac. 679].) This decision was made in February, 1904.

Immediately following its rendition said Teresa Bell filed a petition in the probate court in the matter of said estate, in which she alleged (referring to the allegations in a general way) the making of the first two orders for family allowance above referred to; that no order for such allowance was made subsequent to the filing of the inventory on January 17, 1893, until October 14, 1895; that subsequent to the filing of said inventory it was considered and believed by the petitioner, the executors, the judge of the court, the creditors of the estate, and all the parties interested, that the order of January 12, 1893, continued in full force till the making of the subsequent order of October 14, 1905; that until January 1, 1894, the executors regularly paid said

two thousand dollars a month family allowance; that after the said month, on account of delay on the part of the executors in collecting the income of the estate, petitioner agreed with said executors to allow the ready money in the estate to be used by them in paying assessments on certain stocks owned by the estate for their preservation and for the benefit of the estate, and to await payment of her allowance until a later date, when it was agreed by the executors that all her accrued allowance should be paid her; that under this arrangement only certain amounts were paid on said family allowance during the years 1894, 1895, 1896, 1897, and 1898 (the particular items for each year were set forth) aggregating \$29,213.59; that she was unable to support the family on the sums paid and was compelled to borrow on the security of her separate estate certain amounts yearly (specified in the petition) aggregating twenty-five thousand dollars. It is then alleged that during all the time from June 17, 1893, to October 15, 1895, the estate was amply able to pay a family allowance of two thousand a month. The concluding allegations are that all arrears of family allowance had never been paid, but that a large portion had been paid by the executors subsequent to October 16, 1895, upon orders and judgments of the court in the matter of said estate recognizing said balance and arrears on October 14, 1895, and directing said payments to be made on account of said arrears, which said orders and judgments were not in the record upon which the supreme court decided that the order of January 12, 1893, became inoperative after June 17, 1893.

The prayer of the petition was in the alternative, that an account be taken of the family allowance paid petitioner since October 15, 1895, and chargeable by the orders and judgment of the court made subsequent to October 15, 1895, to the balance of the family allowance due petitioner from the time prior thereto, and for an order directing the payment of any balance of said sums in arrears to petitioner, or for an order allowing and fixing the family allowance of petitioner for the period of time from June 17, 1893, to October 15, 1895, at the sum of two thousand dollars a month as in accord with the purpose and intent of the court and all parties interested in said estate at that time, and after deducting the amounts paid by the executors from June 17,

1893, to October 16, 1895, for family allowance, the balance be paid to petitioner.

The appellants jointly demurred to the petition and moved to strike out certain portions of it which, being overruled, and denied, they answered, denying the allegations of the petition save as to the orders of the court for family allowance and the allegation therein as to the matter decided by this court, and averred that all amounts due said petitioner for family allowance had been paid and exceeded the sum of \$88,541. As a further defense they set up the proceedings in the matter of said estate settling the account of George Staacke, the executor of the will of deceased as to the amount paid to petitioner by said executor for family allowance prior to August 6, 1898, which was contested between the creditors of the estate and petitioner; the order of settlement of said account by the probate court about January 5, 1900, and an appeal to this court by certain of said creditors and the decision of this court on said appeal, and pleaded said decision (*Estate of Bell*, 131 Cal. 1, [63 Pac. 81, 668].) as barring and estopping petitioner in this pending proceeding from claiming that the amount paid her up to said August 6, 1898, for family allowance was less than eighty thousand dollars.

They likewise set up the proceedings for the settlement of the final account of petitioner as special administratrix of said estate filed February 10, 1902, to which we have heretofore referred, in which she sought credit for items of family allowance between the making of the order of January 12, 1893, and that of October 14, 1895, the objections and contests thereto by said creditors, the matter of the appeal to this court from the order settling said account by allowing such credits, the decision and judgment of this court reversing said order (*Estate of Bell*, 142 Cal. 97, [75 Pac. 679]), and pleaded such judgment of this court as final and conclusive and as barring and estopping petitioner from asserting any alleged right to a further family allowance as set forth and asserted in her pending petition. The statute of limitations was further interposed against the claim or right of petitioner to the relief demanded.

Upon the issues thus made the matter proceeded to a hearing and while the petitioner was presenting her case

to the court it developed from the evidence (at least that was the claim of petitioner and the court took that view of it) that the executors of the estate had on February 2, 1894, petitioned the court for a reduction of the family allowance, which petition was opposed by the widow; that the matter of the petition for said reduction coming on to be heard, the executors were examined, the condition of the estate inquired into, and thereafter the matter continued from time to time on the calendar of the court. That on May 1, 1894, the matter coming on again for further hearing and the attorneys for the executors and for said widow having reached some agreement in the matter, they asked the court to dismiss the petition for a reduction. This the court declined to do but ordered the application for a reduction of the family allowance by said executors off the calendar, and further ordered that the allowance of two thousand dollars a month remain and continue until the further order of the court; that the clerk of the court had entered in the minutes the first part of the order directing the petition for reduction off the calendar, but had omitted to enter the balance of the order. Upon this showing from the evidence the petitioner immediately applied for and obtained, over the objection of appellants, leave of court to amend her petition to conform to the facts thus proven, and an amended petition was filed, it being stipulated that the answer to the former petition should stand as the answer to the amended petition, and that all new matters alleged in the petition should be deemed denied by the creditors who had answered. The amendment which was made to the petition by leave of the court and to meet the alleged proof of the making of the order of May 1, 1894, was substantially as follows: The allegation in the original petition that no order was made by the court after the order of January 12, 1893, and until the order of October 14, 1895, was stricken out and it was alleged that after the filing of the inventory it was believed by petitioner, the executors, the court, and the creditors that an order of court existed granting petitioner an allowance of two thousand dollars from and after the date of the filing of the inventory, as well as prior thereto and until the order of October 14, 1895. The prayer of the petition was also changed to conform to the amendment made,

to the extent of asking that an order *nunc pro tunc* as of May 1, 1894, be entered in conformity to the order of the court made on that day but not entered, continuing the family allowance from June 17, 1893, to October 14, 1895, at two thousand dollars per month. The amended petition being filed, the trial proceeded, and upon a submission of the evidence upon both sides the court made its findings of fact in favor of the petitioner, in accordance with the allegations of the amended petition and against the appellants as to all defenses interposed by their answer. The court specifically found that on the first day of May, 1894, the court had ordered and directed that the family allowance of two thousand dollars a month should remain and continue and be paid to the said widow until the further order of the court, but that through the mistake or inadvertence of the clerk of the court, it had not been entered in the minutes of the court, and that there remained unpaid to the petitioner the sum of \$32,665.80 as a balance due her under said order.

The court further specifically found against the appellants on the defenses interposed by their answer,—namely, that the petitioner was barred and estopped by the judgments of the supreme court, which were pleaded, from asserting a claim for family allowance based on said order of May 1, 1894, or from asserting that any family allowance accrued in her favor between the return of the inventory on June 17, 1893, and the order of October 14, 1895. As conclusions of law from the findings the court held the petitioner entitled to have an order *nunc pro tunc* as of May 1, 1894, entered, directing that a family allowance of two thousand dollars a month remain and continue to be paid to said petitioner as widow of said deceased from the assets of said estate until further order of the court, and made a further order directing payment from said assets to her of the balance of family allowance due her under said order of court rendered on the first day of May, 1894, and entered *nunc pro tunc* as of that date, amounting to the sum of \$32,665.80. An order to that effect was accordingly made.

Various points are urged by appellants for a reversal. The main attack, however, is directed against the findings, the claim of appellants being, in effect, that none of the essential

findings of the court are supported by the evidence and it is particularly contended that this is true as to the findings with reference to the effect of the pleaded decisions of this court. As to them it is claimed, that they are not only not sustained by the evidence, but that they are directly contrary to it, and that the conclusions of the trial court as to the effect of those decisions upon the present claim of petitioner are erroneous.

In the view we take of the sufficiency of the attack by appellants upon the findings relative to the prior decisions of this court pleaded by them as a bar, it will be unnecessary to discuss the many other findings which are also attacked. In fact, as far as the finding relative to the decision of this court in the *Estate of Bell*, 131 Cal. 1, [63 Pac. 81, 668], we shall not discuss it at all, because at most that decision bears only upon some of the minor matters involved in the present proceeding which are claimed to have been affected by it. Our consideration will be devoted solely to the findings in as far as they relate to the effect of the decision pleaded and reported in the *Estate of Bell*, 142 Cal. 97, [75 Pac. 679]. We say the effect of the decision, because that is the question presented by the attack upon the findings relative to it. There is no question of conflicting evidence embarrassing the consideration. A transcript of the record on that appeal and the decision of the court based upon it were offered in evidence and constituted the evidence upon which this finding was made. The claim of the appellants under this evidence addressed to their answer pleading the decision in bar of petitioner's right to assert relief under the order of May 1, 1894, was, among other things, that the decision pleaded was a final and conclusive adjudication that there was no such order of May 1, 1894, or any order of the probate court in said estate making any family allowance, save the three orders of January 12, 1893, October 14, 1895, and May 4, 1898.

The finding of the court respecting this decision was of a negative character; that it did not debar or estop the petitioner from asserting or enforcing any alleged right to a further family allowance, nor was the cause of action or relief set forth in the petition barred by such decision. So that, as we say, under this finding the question is, What was

the effect of that decision on the present asserted right of petitioner; what was there decided by this court?

It will be observed that while this finding relates to the effect of the decision upon a further family allowance to petitioner, that proposition, while involved in the original, is not involved under the amended petition. Under the amended petition the right to the payment of the allowance was asserted to have accrued under the alleged existing order of May 1, 1894, an order which had been made but not entered, and which the court ordered entered *nunc pro tunc*, and upon which it based its award for an accrued allowance upon it of \$32,665.85. It is the effect of the decision of this court in the *Estate of Bell*, 142 Cal. 97, [75 Pac. 679], upon the right of petitioner asserted under this order which is to be determined, and we are satisfied that the position of these appellants with respect to it is correct; that that decision was final and conclusive against the existence of any other order than the orders of January 12, 1893, October 14, 1895, and May 4, 1898; that it was *res adjudicata* that no order for family allowance of May 1, 1894, or other order save these three above mentioned had been made prior to 1902 when the account of petitioner as special administratrix, in which she sought credit for family allowance between June 17, 1893, the date of the return of the inventory, and October 14, 1895, was contested and determined, and that all she was entitled to under any then existing orders had been fully paid her.

This appears to us to be so clear from the record which was before this court on appeal from the order settling the account of petitioner as special administratrix, the decision of this court upon it and the application of the doctrine of *res adjudicata*, that no extended elaboration of the matter is called for.

The general rule as to *res adjudicata* is that: "Matters which have been judicially determined cannot be again drawn into controversy between the same parties.

"The judgment of a court having jurisdiction directly upon the point in controversy is, as a plea, a bar; and as evidence, competent and conclusive as between the same parties and their privies; not only where the subject-matter is in all respects the same, but where the point comes incidentally in

question in relation to a different matter.” (*Garwood v. Garwood*, 29 Cal. 514; *Green v. Thornton*, 130 Cal. 482, [62 Pac. 750].)

“An adjudication is final and conclusive not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to, or essentially connected with, the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense.” (*Harris v. Harris*, 36 Barb. 88; *Gray v. Dougherty*, 25 Cal. 266.)

“Where a court of competent jurisdiction had adjudicated upon a particular matter, that matter is not open to inquiry in a subsequent action for the same cause, between the same parties, notwithstanding the defendant may have discovered new evidence not in his power at a former trial.” (*Kilheffer v. Herr*, 17 Serg. & R. 319, [17 Am. Dec. 658].)

Now, applying this doctrine to the matter under consideration: It appears from the transcript on appeal in the matter of the application of petitioner as special administratrix that she sought credit in the settlement of her account for items of family allowance aggregating the sum of twenty thousand dollars, payment of which she had made to herself under a claim that they were due her as such family allowance and had accrued between the date of the return of the inventory and the order of October 14, 1895.

Petitioner was appointed special administratrix in March, 1900, and her account was filed in February, 1902.

The creditors of the estate—the same appellants here—filed a contest against the allowance of such items on various grounds, among others: (1) That no order making any family allowance out of said estate was given or made at any time subsequent to the filing of the inventory and prior to October 14, 1895; (2) that no order or orders making any family allowance out of said estate had at any time been given or made other than, or in addition to, the said three orders so made respectively on January 12, 1893, October 14, 1895, and May 13, 1898; (3) that the amounts of family allowance payable under said orders immediately referred to had been fully paid; (4) that all family allowance at any

time ordered by said court had been paid in full prior to the appointment of petitioner as special administratrix.

Upon these issues raised by this contest a trial was had culminating in an order overruling the objections of the contestants to the allowance of said items. An appeal was taken by the contestants from the order settling the account so far as it allowed the special administratrix said contested amounts of family allowance paid to herself and the order allowing them was reversed by this court in the decision referred to—*Estate of Bell*, 142 Cal. 97, [75 Pac. 679].

An examination of that decision demonstrates that this court decided that the orders of family allowance made by the probate court in said estate were those of January 12, 1893, October 14, 1895, and May 13, 1898; that the first order ceased to be operative on the return of the inventory on June 17, 1893; that all family allowance which had accrued under said three orders had been paid, and directed the court to settle the final account by rejecting the payments in controversy, which were amounts asserted to have accrued under the order of January 12, 1893, and between the return of the inventory and the order of October 14, 1895.

We perceive no ground for any claim that this decision is not conclusive upon the right asserted by petitioner in the present proceeding. Her claim under it now, and the right she presently asserts, is for an order directing the payment of these same items of family allowance—which this court decided on the appeal referred to she was not entitled to—by virtue of an order claimed to have been made on May 1, 1894, but never entered in the minutes, and of the making of which she claims she was not advised until during the hearing on the present proceeding. But the fact that such an order was made and was either forgotten or its making undisclosed to her by the attorney who represented her when it was made and who subsequently ceased to do so, cannot affect the conclusiveness of the judgment on appeal, which is in fact a determination that no order for the payment of family allowance was made or existed after the return of the inventory and up to the making of the order of October 14, 1895.

In her account as special administratrix she sought credit for the payment to herself of this allowance as having

accrued in her favor between those dates. She could only have been entitled to such credits by virtue of the existence of some order of court making a family allowance which authorized the payments they represented. The contestants objected to their allowance expressly on the ground that there was no such order or any orders for family allowance, save the three which have been mentioned. There was, therefore, raised a direct issue as to what orders for payment of family allowance had been made which would support the claim to the credits asserted by petitioner. In support of her right to a credit for such payments, the administratrix offered the three orders above referred to, but no other. If the order of May 1, 1894, had then been made as found by the court in the present proceeding, it would have supported the claim petitioner asserted in her account as administratrix and which was contested for want of its existence, and it was essential to sustain such claim that she should have proved it. Whether that order, or any order authorizing their payment existed, was the issue in the contest and it was necessarily determined by the decision on appeal in that matter that no order, other than the orders specially referred to, was in force from the return of the inventory to October 14, 1895, under which any allowance asserted to have accrued during that period could be supported or sustained. If there was any order in force during that time, then the contested accounts were properly payable under it for that period, and instead of being rejected would have been allowed by this court by virtue of such order. In determining, however, that the amounts sought to be credited in her account were payments made to herself under the order of January 12, 1893, asserted to have accrued between the date of the return of the inventory and the order of October 14, 1895; that that order ceased to operate on the return of the inventory; that all allowance which had accrued under the orders of 1895 and 1898 had been fully paid; and that the account of the administratrix should be settled by the lower court by rejecting the contested items, this court decided that there was no order of court under which such contested payments could be sustained. That decision is final and conclusive against the existence of the order upon which petitioner now bases her right to the payment of these same amounts.

It is insisted by counsel for respondent that the decision of this court referred to has no bearing upon the order of May 1, 1894, which he denominates a separate and distinct order because that order was not before this tribunal for consideration. But if the order was separate and distinct that fact cannot affect the question of the conclusiveness of the decision under consideration, because whatever its character, its existence was a point at issue in the contested account proceeding. The question directly at issue was whether there was any order of court which could sustain the contested items. It was not a question as to a particular order, but what orders had at any time provided for a family allowance which would support them. If the order of May 1, 1894, was made, it would have sustained their payment. It would have been direct, as it was in fact essential, evidence necessary to support them, and was evidence that existed and which might have been produced at the hearing of said contest. The most that can be claimed by respondent now is that she was not aware of this order when the contest over the account was being had. But this only amounts to an insistence that the conclusiveness of the decision against the existence of any other orders during the period involved in said contest, save the three orders mentioned, may be overcome by showing that new evidence—the existence of another and fourth order—can now be produced. But under the authorities the conclusiveness of a judgment cannot be avoided for that reason. A solemn judgment determining the rights of parties to a controversy cannot be overcome by showing that new or additional evidence can now be produced upon the issue there involved and decided, which the party was unable to produce upon the former trial. If such a rule could obtain, judgments would never be conclusive. The rule as to the conclusiveness of judgments is based upon considerations of public policy—that there may be an end to litigation. The supreme court of the United States in *Southern Pacific R. R. Co. v. United States*, 168 U. S. 1, [18 Sup. Ct. 18], referring to the general rule as to the binding effect of judgment on matters definitively put in issue and directly determined, says: "This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society

by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order, or the aid of judicial tribunals would not be invoked for a vindication of rights of persons and property, if, between parties and their privies, conclusiveness did not attend the judgment of such tribunals in respect to all matters of property put in issue and actually determined by them."

It is further insisted by respondent that the decision we have been discussing is not binding upon her in the present proceeding because here, she appears individually, and in the former proceeding she appeared as administratrix; that where it is sought to bind a person by a former judgment it is necessary that he should have been not only a party to both actions, but must have appeared in both in the same capacity or character. As a general rule this is true, but it can have no application here. While it is true that petitioner was acting in her official capacity as administratrix when she was seeking to sustain her right to the payments involved in the contest over her account, it was for her own individual benefit and for her sole advantage that she was asserting it. It involved nothing with relation to her official capacity, save that she had paid it to herself individually. She was asserting her claim in her own right as the real party in interest; she was not asserting any right proceeding from her official capacity as administratrix. Both then, and now, she was insisting upon the right to the allowance upon exactly the same ground; that she was entitled to it as having accrued in her favor during the period between the date of the filing of the inventory and the order of October 14, 1895, under orders of the court awarding it. Under these conditions it cannot be said that she appeared in either matter in a different capacity or character. In both proceedings she was the real party in interest, asserting individual and not representative rights, and is bound by the judgment. (1 Greenleaf on Evidence, sec. 535; 1 Freeman on Judgments, 4th ed., sec. 174; *Colton v. Onderdunk*, 69 Cal. 155, [58 Am. Rep. 556, 10 Pac. 395].)

We have pursued this discussion sufficiently. The finding of the trial court as to what was determined in the decision in the *Estate of Bell*, 142 Cal. 97, [75 Pac. 679], and the

conclusions of that court as to the effect of that decision are erroneous. It decided, and was conclusive to the point, that no order of court save the orders specially mentioned in it, existed making an allowance to petitioner between the return of the inventory and the order of October 14, 1895, and determines that all allowances under any order of court making them had been fully paid to respondent.

Under this view, it is, as we have said, unnecessary to consider any other of the various grounds urged by appellants for a reversal.

The order appealed from is reversed with costs to the appellants.

Shaw, J., Angellotti, J., Sloss, J., and Henshaw, J., concurred.

Rehearing denied.

[S. F. No. 4583. In Bank.—April 3, 1908.]

In the Matter of the Estate of THOMAS BELL, Deceased.
TERESA BELL, Widow, Respondent; NATIONAL
BANK OF D. O. MILLS, Appellant.

ESTATES OF DECEASED PERSONS—IMPROPER CREDITS UPON FAMILY ALLOWANCE—RES ADJUDICATA—RIGHTS OF CREDITORS—APPEAL.—A creditor who, without further action, rested upon demurrer to a petition seeking credits upon a family allowance, which were contrary to the decision of this court upon a former appeal, but who has appealed from the final judgment upon a transcript identical with that appearing in S. F. No. 4582, *supra*, may avail himself of the former judgment of this court set up by other creditors, which inures to the benefit of all other creditors, as *res adjudicata*; and, since the petition demurred to has no legal existence, such creditor is entitled to a general reversal of the order appealed from, which made an improper allowance of such credits upon an intervening order adjudged by this court not to exist.

APPEAL from an order of the Superior Court of the City and County of San Francisco directing payment to the widow of a deceased person on her family allowance. J. V. Coffey, Judge.

The facts are stated in the opinion of the court in this case, and in case No. 4582, *supra*.

James M. Allen, for Appellant.

T. Z. Blakeman, for Respondent.

THE COURT.—This is an appeal from the same judgment and order in favor of respondent for payment of family allowance as was involved in the appeal of Louisa J. Thompson et al. (S. F. No. 4582), this day decided and reversed, *ante*, p. 331, [95 Pac. 372]. Unlike that appeal, however, the present one involves the validity of an order of court overruling the joint, general demurrer to the original petition of respondent interposed by this appellant and the other creditors of the estate represented in the Thompson appeal and the order denying their motion to strike out certain parts of the petition. This appellant rested on its demurrer and motion to strike out, and after the order of court respecting them, while the other demurring creditors answered, this appellant did not in any manner further appear in the cause by answer or otherwise, except to take this appeal after the proceeding had culminated in the judgment and order awarding petitioner her claim for a family allowance. The transcript on this particular appeal is identical with the transcript in the Thompson appeal. It appears therefrom that the other creditors had answered, and during the trial of the proceeding the petition of respondent was amended and the relief thereby asked was based on allegations substantially different from those contained in the original petition and were sufficient to withstand a general demurrer. (See decision in the Thompson appeal, *supra*.)

In the Thompson appeal we held that the decision in the *Estate of Bell*, 142 Cal. 97, [75 Pac. 679], was conclusive against the right of petitioner to recover upon the cause of action stated in her amended petition. Such reversal on that ground precludes petitioner from further proceeding under the present petition as it stands, and such reversal inures to the benefit of all the creditors of the estate, as well as this appellant, as the creditors presenting the Thompson appeal. As far as the petition to which appellant demurred is concerned,

it has no further legal existence as a petition, and no possible action can be taken on it which will affect this appellant. Under these circumstances, as appellant appeals generally from the judgment and order of the court, a general reversal of the order appealed from, as far as this appellant is concerned, should be had, and it is so ordered.

Rehearing denied.

[Sac. No. 1609. In Bank.—April 2, 1908.]

In the Matter of the Petition of FRANK B. OGDEN for a review and modification of the opinion rendered in the case of *Pekin Mining and Milling Company v. James Kennedy*, 81 Cal. 357.

In answer to a petition filed by Frank B. Ogden, now a judge of the superior court of Alameda County, for a review and modification of certain statements contained in the opinion of this court in the case of *Pekin Mining and Milling Company v. James Kennedy*, 81 Cal. 357, it is held that the statements in that opinion were based, of course, exclusively upon the findings made by the trial court, and were in no sense the result of an examination by this court, nor could they in any sense be construed as expressing the views of this court upon the matter; and that it is manifest that the exoneration of Judge Ogden upon the showing made in his petition is full and complete. This court also, from personal knowledge of Judge Ogden, joins in the expression of confidence embodied in the findings of the judges of the superior court of Alameda County; but, from the character and limits of the jurisdiction of this court, it is impossible for it to attempt to amend or correct the findings of the trial court, and so, impossible for it to afford the specific relief prayed for. The court orders the publication of its views in this matter, stating that it should suffice for the complete exoneration of the petitioner.

THE COURT.—In 1889 this court handed down a decision in the above-entitled case, which will be found reported in 81 Cal. 357, [22 Pac. 679]. In its opinion this court made reference to, and repeated the substance of, certain findings of the trial court, which findings reflected upon the fair dealing of Frank B. Ogden, petitioner herein. The gist of these findings

was that the said Ogden improperly and in fraud of the rights of James Kennedy and others, defendants, represented at an execution sale of certain mining claims of the Oro Fino Mining Company, that the Oro Fino Mining Company was not the owner of the property, and, after the sale, wrote his name in the constable's certificate of sale under execution. In the answer of Kennedy and others in the above-entitled suit no charge of fraud was made against Ogden, and there was no intimation that he was to be charged with fraud. Nothing in the answer tended to give notice that any such fraud was claimed. At the trial of the cause Ogden was called, testified, and went his way. Upon his examination neither his integrity nor the fairness of his acts was called in question. He never was informed during or after the trial of the cause that his testimony had been disputed, or his fair dealing questioned. He had no interest in the litigation, and the first knowledge that he acquired that the findings of the trial court in any way reflected upon him was from reading the reported decision of this court. Immediately upon becoming aware of this decision, the said Ogden himself presented the matter to the bar association of Alameda County, of which he was a member, with a request that an immediate investigation of his conduct be had. Such investigation was had and resulted in his complete exoneration, and the bar association of Alameda County addressed a letter, early in the year 1890, to the justices of this court, declaring that, after examination, the said Ogden, who at that time had become a judge in the county, was about to request a hearing before this court of the matters touching his integrity, and asked that such hearing be granted him. The judges of the superior court of Alameda County, expressing from their own knowledge the highest opinion of the character of Judge Ogden, united with the bar association in this request. The request which was urged upon this court personally by Judge Ogden, and also by a committee of the bar association of Alameda County, appointed for that purpose, was to the effect that this court should in some appropriate manner investigate the matter of the alleged fraud of Ogden, and report its conclusions thereon in some suitable way by footnote or appendix to the case of *Pekin Mining and Milling Co. v. Kennedy*, already reported. The justices of this court, each and all expressing willingness to do anything to sub-

serve the ends of justice, pointed out the impossibility of adding such footnote to the volume because it was already in print, and suggested, moreover, that as the judgment of this court in the case had been a judgment ordering a new trial it would be possible for Judge Ogden, upon such new trial, to have the facts thoroughly investigated, and a finding in accordance with those facts declared by the trial court. Judge Ogden then immediately communicated with Marcus P. Bennett, Esq., who had been the attorney for the plaintiff in the litigation, urging him to press the case for retrial, and offering to bear all the cost and expenses attending such trial, for the sole purpose, so far as he was concerned, of presenting to the court all of the evidence upon the question of his alleged fraudulent practice. Judge Bennett replied that a new trial was impracticable, as the hostile interests had been consolidated and the case had passed from his management and control, concluding his letter by offering his assistance to do whatever he could "to remove the blot from your good name, which I believe has been most unjustly attached to it."

Judge Ogden then requested Judge Bennett to confer with Judge Williams, who was the trial judge, and learn from him whether he would not be willing to take evidence and report upon this single matter, it being urged that he could do so without impairment of any of the rights under the decision, since his judgment had been reversed by the supreme court, and his finding of the fraudulent practice of Ogden was not within the issues of the case and in no way necessary to sustain the judgment. Judge Williams, in turn, could not see his way clear to try any portion of the case by piecemeal and declined to do so. Appeal was also made to George G. Blanchard, Esq., who had been the attorney for the defendants in the case, asking his aid that the matter might be thoroughly investigated and cleared up, and Mr. Blanchard wrote that he "exonerated Mr. Ogden from all imputation or wrong in the matter you refer to. . . . I am ready to do anything in my power to relieve Mr. Ogden in the matter you speak of. Judge Williams has gone out of office and of course can make no order in the case. Say to Mr. Ogden to prepare such a paper as will meet the facts of the case and it shall be done with as he may suggest."

Being thus unable to obtain relief from any quarter, Judge Ogden was constrained to give over his attempts, and in this situation the matter rested until 1893. In that year Judge Ogden's name was under consideration by Governor Markham for appointment to the position of judge of the superior court of Alameda County. Confronted by the case in the eighty-first volume of our reports, his Excellency appointed a commission, composed of the three judges of the superior court of Alameda County, to take evidence on the matter and report their findings to him. Such evidence was taken, and the following report and findings were made:—

"The transaction which bears most heavily against the said Ogden is found in the decision of the supreme court, expressed in this language:

"It had been agreed between Miller, Bargion and Kennedy that the latter should bid off the property in his own name. But it had also been agreed between Miller and Frank B. Ogden, that said Ogden should attend the sale for the purpose of procuring the title to said mine to be taken in his (Ogden's) name. Ogden attended the sale, and it was agreed between him and Kennedy, that, for the purpose of deterring bidders, Ogden should give public notice at the sale that the mine did not belong to said Oro Fino Corporation, but was the property of him (Ogden). Such notice was accordingly given, and the mine was bid in by Kennedy, as before stated, but another complication arose. Ogden volunteered his assistance to the justice of the peace to write out the certificate of sale, and inserted therein his own name as purchaser, instead of that of Kennedy. This was not known to or discovered by the Constable (Cline) or Kennedy."

"Upon these matters we make the following findings:—

"Said Ogden did attend the sale and give public notice that the mine did not belong to said Oro Fino Corporation, but was the property of him, Ogden.

"This notice was given in the belief, honestly entertained by said Ogden, that the title to said mine was in fact and in law in him, the said Ogden, under his deed from Schenck. This belief was at the time shared by Kennedy, Bargion and Miller. There was no attempt to defraud the judgment creditor, Phelps, or prevent his obtaining from the sale the full

amount of his judgment, and, in fact, the full amount of his judgment and costs was bid and the judgment creditor, Phelps, received all of the money from the sale of the property to which he was entitled under his judgment.

"It is true that Ogden volunteered his assistance to the justice to write out the certificate of sale, and inserted therein his own name as purchaser. It is not true that this was done without the knowledge of Kennedy or in fraud of Kennedy or Bargion, or in fraud of any person soever.

"We find that the said Ogden volunteered his services merely as penman. That he wrote his name in the certificate of sale because it was the understanding and agreement between Miller, Bargion and Kennedy that he should do so. And here we proceed to a brief analysis of the testimony before us on this point:—

"Manifestly there was no fraud and no impropriety in the said Ogden writing his name in said certificate, if in fact it was understood between Kennedy, Bargion and Miller, that the certificate should be issued in the name of Ogden as purchaser.

"Miller swears that it was the understanding between himself, Bargion and Kennedy, that the certificate should be taken in Ogden's name, and states the reasons therefor in his affidavit.

"Peter Bargion is now dead. His wife, however, makes affidavit to the high opinion which her husband always entertained of the character of the said Ogden, and her recollection that the certificate of purchase at the sale, under the Phelps judgment, should be taken in the name of Frank B. Ogden.

"The said Ogden testifies to like effect as Miller.

"In addition to this we have the evidence of Hon. Walter Van Dyke (now judge of the superior court of Los Angeles County, at that time attorney for said Miller), in the form of a letter addressed to said Ogden, bearing testimony to the honorable conduct and character of Ogden, and to the fact that the mine 'was sold under the Phelps claim, and was bid in by Ogden, Kennedy paying the money at the sale.' A payment understood, at the time, to be a payment on account of his indebtedness to Miller. Which evidence is strongly corroborative of that of Ogden and Miller.

"We have next the testimony of George G. Graham, likewise in a letter, to the effect that he was present at the sale, and drove Ogden and Kennedy to the mine. That at the sale Ogden stated, and the constable, Cline, announced, that the property was sold to Frank B. Ogden. That after the sale at the time Kennedy referred to the fact that the certificate was in the name of Frank B. Ogden.

"There is also the testimony of the justice of the peace, Tracy, taken upon the trial of the case, to the effect that Ogden wrote the certificate at his, the justice's, dictation, and that he, the justice, saw Ogden write his name in the certificate. And here it can scarcely be believed that if it was not by the justice at that time known to be the proper name therein to be inserted, he would have done as he testifies that he did, said nothing about it until a month or two thereafter.

"There is also the additional fact, undisputed by the evidence, that the said Ogden wrote the certificate in duplicate, each containing his own name, left them for the constable to sign, with instructions to the constable to file one for record, and it in fact was filed, and to deliver the other to Kennedy upon the payment by Kennedy of the money. One was actually filed for record and carried as matter of law, constructive notice to the world, of its contents, and the other was actually delivered to Kennedy long prior to July 1st, the date of his difference and trouble with said Miller. It is difficult to believe that any person would attempt the perpetration of so palpable a fraud, and one in its nature almost impossible to escape detection, and attempt the perpetration of such a fraud, the justice himself knowing that Ogden's name was written therein, the constable being called upon to sign them as his official act, one being placed of record, the other delivered to Kennedy himself, it is difficult, we say, to believe that under all these circumstances the fraud should have gone undetected, until nearly a month after the date of the beginning of the trouble between Kennedy and Miller.

"We are of the opinion that the more rational view is that the charge of fraud was simply an afterthought of defendant Kennedy. In this we are sustained by the opinion of Hon. Marcus P. Bennett, then attorney for plaintiff, now

judge of the superior court of El Dorado County, who says in his letter above quoted, 'I contended for a very different finding, and argued the case on the theory of your entire innocence in taking the certificate in your own name, and supposed that the court would find in accordance with that theory, and was *mortified and surprised* that it did not.' Also the opinion of Hon. George C. Blanchard, found in his letter to A. A. Moore, above quoted, to the effect, that he exonerated Mr. Ogden from all *imputation of wrong* in the matter,' and that he had already willingly executed a declaration to that effect.

"As against all this testimony the charge of fraud has to be sustained, if sustained at all, upon the testimony of the single witness, Kennedy. And the proposition briefly stated is this: If Ogden wrote his name in the certificate of sale, without the knowledge and consent of Kennedy, he was guilty of a fraud. If he wrote his name in the certificate, with the knowledge and consent of Kennedy, he was entirely innocent of any fraud. Kennedy says this was done without his knowledge and consent. Giving to the testimony of Kennedy all the weight to which it is entitled, as the testimony of a single, credible witness, it is still greatly outweighed by all of the other testimony before us, which is entirely in favor of the account given by said Ogden.

"But is the testimony of Kennedy to be treated as the testimony of a credible witness? Assuredly not. No testimony impeaching Kennedy was before the trial court of El Dorado County, and little testimony in favor of Ogden was before the court; for, as has been hereinbefore set forth, it could not be determined by Ogden, and was in fact unknown to Ogden, that his integrity was to be questioned in that case. The answer of Kennedy, on file in the action, raises no such issue, and it was not to be supposed by Ogden or by the attorney for the plaintiff in that case, that his good name would be involved in the litigation. In illustration of this fact it may be noted that the Hon. Walter Van Dyke, who was familiar as an attorney and adviser, with all of the matters, testified in the case by deposition. He could and would doubtless then, as he does now, bear witness to the good faith of Ogden in all of the transactions.

But his deposition is silent upon the question. No interrogatories were put to him upon the subject of the certificate, because no one upon the plaintiff's side at that time knew that foul play would be charged in relation to the certificate.

"It is not for one moment to be supposed that had all of this evidence now before us been taken in the trial court, that the finding in question would have been made.

"In addition to that we have stated that Kennedy is not to be considered as a credible witness, and this is so because of the certified copies of papers now before us, and here marked as exhibits, it is proved that the said Kennedy had been convicted and sentenced in the state of New York for the crime of conspiracy committed as follows: 'The said Kennedy conspired with one Thomas and procured insurance upon the life of one Edward G. Burnham, a fictitious and non-existing person, in the sum of \$10,000. Thereafter the said Kennedy procured a corpse, represented to the insurance companies that the corpse was the corpse of the said Burnham, caused the said corpse to be buried, and sought to collect the insurance. Also that the said Kennedy fled to the state of California, from the state of New York, to escape meeting four several indictments preferred against him by the grand jury of the city of Buffalo in 1883 (the transactions here under consideration took place in 1884), accusing said Kennedy of forgery and false pretenses as set forth in exhibit 6.'

"Also that the said Kennedy was at the time a lawyer, and was after due process disbarred by the supreme court of Erie County, New York, for his wicked, corrupt and felonious practices, and that his license to practice law was by said court canceled and revoked.

"Also that upon coming to this state the said Kennedy procured himself to be admitted to practice before the superior court of El Dorado County upon presentation of his said canceled certificate from the state of New York, and upon representation that the said certificate was in full force and effect, and upon testimony of his good moral character, furnished by the constable, Cline, who was a witness against said Ogden in the Pekin Mill & Mining Company suit.

"Thereafter the fact being made known to the judge of the superior court of El Dorado County, who was the same judge who tried the Pekin Mill & Mining Company's suit, and made the said finding against the said Ogden, supported largely, if not wholly, by the testimony of said Kennedy, the said Kennedy failing to appear before the court to explain his conduct in the premises was by the court ordered disbarred and forbidden to practice.

"As against this evidence of dishonesty of said Kennedy, there is before us abundant evidence of the highest kind and of the strongest nature in support of the character and reputation of said Ogden for truth, honesty and integrity; and, moreover, the judges of this court from long knowledge of and personal acquaintance with the said Ogden, are themselves, and each of them, able to bear witness, and do hereby bear witness, that the said Ogden during all his life has borne and now deservedly bears the highest reputation for truth, honesty and integrity, and is known and accredited in the community in which he resides as a man of the utmost rectitude in all the affairs of life.

"In conclusion, therefore, the judges of this court find that in none of the transactions mentioned or referred to in the Pekin Mill & Mining Company's suit, was the said Ogden guilty of any fraud; but, to the contrary, his conduct throughout was entirely free from fraud, and characterized by the best motives."

The foregoing findings from the record before us are abundantly substantiated. But notwithstanding this and the fact that the citizens of Alameda County have repeatedly expressed their conviction of Judge Ogden's integrity, by continuously and uninterruptedly electing him to the office of judge of the superior court, still the record of the case in the eighty-first volume of our reports stands, and unless corrected, will stand against him, his children, and his children's children, as a monument of infamy. For this reason, and upon this showing, he asks this court to afford him relief.

The statements in volume 81 of the California Reports were based, of course, exclusively upon the findings made by the trial court. They were in no sense the result of an examination by this court, nor could they in any sense be construed as

expressing the views of this court upon the matter. It is manifest that the exonerating of Judge Ogden upon the showing thus made is full and complete. This court also, from personal knowledge of Judge Ogden, joins in the expression of confidence embodied in the findings of the judges of the superior court of Alameda County. But, from the character and limits of the jurisdiction of this court, it is impossible for it to attempt to amend or correct the findings of the trial court, and so, impossible for it to afford Judge Ogden this specific form of relief. However, the publication of the foregoing should suffice for his complete exoneration.

McFARLAND, J.
HENSHAW, J.
SHAW, J.
ANGELLOTTI, J.
LORIGAN, J.
SLOSS, J.
BEATTY, C. J.

[S. F. No. 4872. In Bank.—April 3, 1908.]

LAURA E. TRACY et al., Petitioners, v. JAMES V. COFFEY, as Judge of the Superior Court of the City and County of San Francisco, Respondent.

PROBATE ORDERS—ENTRY IN MINUTE-BOOK—TIME OF APPEAL—FORM OF ORDER SIGNED BY JUDGE.—Section 1704 of the Code of Civil Procedure requires probate orders to be entered in the minute-book of the court, and it is the order there entered, and not a separate paper signed by the judge purporting to embody the terms of the order, that is the order of the court, and it is the date of the entry of this order which sets the time running for an appeal.

ID.—CAPTION OF ORDER—OMISSION OF NAME OF COURT.—In making entries of orders in the minute-book it is not necessary to begin the entry of each order with a statement of the name of the court in which it is made.

ID.—DISCREPANCIES BETWEEN ORDER AS ENTERED AND DOCUMENT SIGNED BY JUDGE.—The fact that another memorial exists, consisting of a document signed by the judge and filed with the papers in the case, and that there are some slight discrepancies between such

document and the entry in the minute-book; does not affect the validity of the minute entry, nor extend the time of appeal until another entry was made.

APPLICATION for a Writ of Mandate directed to James V. Coffey, as Judge of the Superior Court of the City and County of San Francisco to compel the settlement of a bill of exceptions.

The facts are stated in the opinion of the court.

Horace W. Philbrook, W. J. Bartnett, and William T. Baggett, for Petitioners.

J. C. Campbell, and Thomas H. Breeze, for Respondent.

SHAW, J.—The petitioners apply for a writ of mandate to compel the respondent, as judge of the superior court of the city and county of San Francisco, to settle a bill of exceptions relating to the proceedings and evidence taken upon the making of an order admitting to probate the will of Jacob Z. Davis, deceased, the purpose of the petitioners being to use the said bill of exceptions upon an appeal to the supreme court from said order.

The order in question was made on August 17, 1897, and was entered at length in the regular minute-book of the department of the superior court on September 5, 1897. The time for taking the appeal therefrom expired on November 4, 1897. Before this entry the order was reduced to writing and signed by the judge. The document as signed had a caption at the top of its first page beginning with the words "In the Superior Court of the City and County of San Francisco, State of California, Department 9. Probate." In entering the order in the minute-book, this part of the caption was omitted. At another place in the entry the word "said," of the phrase "the said proofs," as the order was drawn in the document, was omitted.

Claiming that these omissions vitiated the act of entering the order and rendering the entry null and void, the petitioners caused it to be again entered in the minute-book of the court on July 31, 1907, with the aforementioned part of the caption and the word "said" carefully inserted. Their contention now is that this latter entry is the only valid and

effectual entry of the order that has ever been made, and that the time wherein they could appeal therefrom did not begin to run until that date. Acting upon that theory they took proceedings for an appeal to this court within sixty days after the said date and asked for the settlement of the proposed bill of exceptions.

The variations aforesaid of the minute-book entry of September 5, 1897, from the signed order, did not vitiate it, or annul its effect as an entry of the order. It is admitted that that entry was made in the proper minute-book. The part of the caption omitted was not a necessary part of the order and the omission of the word "said" did not affect the meaning of the phrase and was of no importance or significance. There is no statute expressly authorizing the making of a memorial of the terms of an order of the superior court by the method of writing it on a separate piece of paper and having the judge attach his signature thereto. It has become customary to do so in many instances and the courts have often recognized such a memorial as competent evidence of the terms of the order. But the code (Code Civ. Proc., sec. 1704) expressly requires probate orders to be entered in the minute-book of the court. It is the order there entered which is the order of the court, and it is the date of the entry of this order which, under our decisions, set the time running for an appeal. In making entries in the minute-book it is neither necessary, nor, so far as we are advised, customary, to begin the entry of each order with a statement of the name of the court in which it is made. The fact that another memorial exists consisting of a document filed with papers in the case, and that there are some slight discrepancies, such as those above mentioned, between the filed order and the entry in the minute-book, would not affect the validity of the minute entry, nor extend the time of appeal, until another entry was made. The petitioners have no valid appeal and no right to any bill of exceptions on the appeal they are attempting to take.

The petition is denied.

Henshaw, J., Lorigan, J., Angellotti, J., Sloss, J., and Beatty, C. J., concurred.

Rehearing denied.

[S. F. No. 4896. In Bank.—April 20, 1908.]

In the Matter of the Estate of JAMES MOFFITT, Deceased.

INHERITANCE TAX—WIFE'S SHARE OF COMMUNITY PROPERTY LIABLE FOR.

—The surviving wife's share of the community property of herself and her deceased husband is subject to the payment of the inheritance tax imposed by the act of March 20, 1905, prescribing that "All property which shall pass by will or by the intestate laws of this state from any person who may die seized or possessed of the same . . . shall be and is subject to a tax hereinafter provided for."

ID.—WIFE TAKES COMMUNITY PROPERTY AS HEIR.—Upon the death of the husband the wife takes one half of the community property as heir.

ID.—CONSTRUCTION OF STATUTES—PRIOR JUDICIAL DECISIONS.—It is a fundamental rule for the interpretation of a statute that it is presumed to have been enacted in the light of such existing judicial decisions as have a direct bearing upon it.

ID.—CONSTITUTIONAL LAW—PROVISIONS AFFECTING COMMUNITY PROPERTY.—Under section 14 of article XI of the state constitution of 1849, and the laws enacted thereunder, the wife has no vested estate in the community property, and the inheritance tax law of 1905, in so far as it imposes a tax on community property acquired under that provision of the state constitution is not in conflict with any provision of the state constitutions of 1849 or 1879, or with any provision of the constitution of the United States.

APPEAL from an order of the Superior Court of Alameda County directing the payment of an inheritance tax. T. W. Harris, Judge.

The facts are stated in the opinion of the court.

Olney & Olney, and Warren Olney, for Appellants.

Snook & Church, for Respondent.

HENSHAW, J.—This is an appeal by the widow and the executors of the will of the deceased from an order and decree made by the superior court of Alameda County in probate, directing the executors to pay to the county treasurer of Alameda County the sum of \$26,684.50 as the inheritance tax upon the interest of the widow in the community property of herself and her deceased husband. The inheritance tax law

of this state, approved March 20, 1905, prescribes that "All property which shall pass by will or by the intestate laws of this state from any person who may die seized or possessed of the same . . . shall be and is subject to a tax hereinafter provided for." The single question presented by this appeal is whether the surviving wife's share of the community property is subject to this inheritance tax.

It is conceded that the determination of the trial court that such property is liable for the payment of this tax finds support in the cases of *In re Burdick*, 112 Cal. 387, [44 Pac. 734]; *Spreckels v. Spreckels*, 116 Cal. 339, [58 Am. St. Rep. 170, 48 Pac. 228]; and *Sharp v. Loupe*, 120 Cal. 89, [52 Pac. 134, 586]. But it is earnestly contended that this court should overrule these cases to the extent of holding that as to the community property the widow has such an ownership or estate or title as enables her to take upon the death of the husband, not as his heir, and not by succession, but by a certain right of survivorship; that, in effect, the wife during the existence of the marriage *status* has always enjoyed an ownership in one half of the community property and that by the death of the husband her ownership of this moiety is simply released from the power of disposition over it with which the law during his lifetime and during the existence of the marriage *status* has clothed him. Reference is made to the language of the Civil Code (sec. 682) which declares that ownership of property by several persons is either: 1. Of joint interest; 2. Of partnership interest; 3. Of interests in common; 4. Community interest of husband and wife. We are referred also to expressions in some of the earlier decisions of this court, such as the language of *Beard v. Knox*, 5 Cal. 256, [63 Am. Dec. 125], where it is said: "The husband and wife, during coverture, are jointly seized of the property, with a half interest remaining over to the wife, subject only to the husband's disposal during their joint lives. This is a present, definite and certain interest, which becomes absolute at his death."

All of these code sections, all of these cases, and all of these arguments were most ably urged upon the attention of the court in the first two cases above cited, and the conclusion then reached was there expressed in the following language: "Courts and counsel have occasionally endeavored to find some

property right in the wife, or some respect in which the husband's interest falls short of full property. I think it will be universally admitted that so far there has been a complete failure in this respect. The first attempt shown by our reports of that kind is in *Godey v. Godey*, 39 Cal. 157. In that case it is said that while no other technical term so well defines the wife's interest as the phrase 'a mere expectancy . . . it is at the same time, . . . so vested in her that the husband cannot deprive her of it by his will, nor voluntarily alienate it for the mere purpose of divesting her of her claim to it.' "

After painstaking investigation and review, and after the fullest deliberation, this court in *In re Burdick* determined and held, as it declared in *Spreckels v. Spreckels*, that upon the death of the husband the wife takes one half of the community property as heir. Every argument here advanced against that conclusion was urged by learned counsel in the other cases, and was fully met in the opinions above referred to. No useful purpose can be subserved by a repetition of these arguments or of the answers to them. A reading of the opinions of this court in those cases will establish how thoroughly the questions were entered into and what a complete disposition was made of them.

It is next urged that as laws imposing inheritance taxes are subject to strict construction, and that as it could not have been in the legislative mind that by this act there was imposed a tax upon the widow's share of the community property, therefore a construction should be sought which will avoid this harsh result. But a familiar and fundamental rule for the interpretation of a legislative statute is that it is presumed to have been enacted in the light of such existing judicial decisions as have a direct bearing upon it. Thus the legislature is presumed to have enacted it with full knowledge that this court in *Bank*, not once but repeatedly, had declared that the wife did take her share of the community property upon the death of her husband by succession as his heir. The next and necessary presumption which follows is that the legislature enacted the inheritance tax law in the light of these decisions and to the end that the widow's share of the community property should bear this tax quite as much as would the portion of the husband's separate estate which might

come to her by will or by the laws of succession. In other words, since the legislature knew that the latest expression from this court upon the subject was an unequivocal declaration that the widow did take her share of the community property as heir of the husband, if it had designed that the widow's share should not be subject to this tax, it would have made provision that it should be excepted from the operation of the law. If, however, the truth be as counsel urge, that it never entered the minds of the men constituting the legislative body that they were imposing this tax upon the community interest of the wife, it can only be said that for their ignorance they, and not the courts, are responsible, and for their omission they, and not the courts, must find the remedy.

Appellant further shows that the community property here under consideration was acquired under the constitution of 1849 and the laws referable thereto. That constitution, after defining the separate property of the wife, declared (sec. 14, art. XI): "Laws shall be passed more clearly defining the rights of the wife in relation, as well to her separate property, as to that held in common with her husband." Upon these facts appellant argues that the constitution of 1849, together with the laws passed in conformity with its direction, "conferred upon the wife an equal interest with her husband in the common property," and it is said that while the constitution of 1879 is silent upon the matter of the community property, nevertheless, neither that constitution nor any new laws passed under it can deprive the wife of her interest in the community property guaranteed and secured to her by the constitution of 1849, and the question is asked: "Shall this court do what the legislature cannot do and take from her a vested right?" Appellant's counsel answer this question to their own satisfaction by invoking the aid of section 10 of article I and section 2 of amendment XIV of the constitution of the United States.

It cannot be doubted, indeed it is conceded, that the constitution of 1849, in speaking of property "held in common with her husband" does not refer to tenancies in common as known to the common law, but does mean property of the character now universally designated "community property." Thus, the declaration of the constitution of 1849 above quoted amounts to no more than a mandate to the legislature to

define and prescribe the rights of the wife in the property of the community. The Spanish-Mexican civil law was, of course, the law in force in California at the time of its cession by Mexico to the United States and it was the design of the constitution of 1849 to preserve, so far as might be, to the wives of the inhabitants of the new state (most of whom were at that time former citizens of Spain or Mexico) the rights to the community property which they had enjoyed under the Mexican rule. But even under the Spanish-Mexican civil law the wife had no vested estate in the community property. She had rights which may be loosely described as "vested" in the sense that the person to whom the rights belonged was not doubtful or uncertain but positive and known; in this sense only were her rights vested but those rights never amounted to an estate. She became vested with an estate only (under certain contingencies) upon the dissolution of the marriage or upon the death of the husband; otherwise, as sums up Ballinger, after review of the system, "her interest seems to be a mere expectancy during coverture similar to that under the French system." (Ballinger on Community Property, p. 29.) And, says the supreme court of Louisiana (Boyer's Succession, 36 La. Ann. 506), "The wife has during the marriage no vested proprietary interest in any property composing the community, but only an inchoate right which entitles her to the hope or expectation that if she survives her husband she can receive or own one half of the property that may be left after payment of the community debts." And again says Platt (Property Rights of Married Women; see *Fallbrook Irr. Dist. v. Abila*, 106 Cal. 362, [39 Pac. 794]): "The wife has no voice in the management of these affairs, nor has she any vested or tangible interest in the community property. The title to such property vests in the husband, and for all practical purposes he is regarded by law as the sole owner." But passing from the enunciations of these writers, learned in the law on the subject, we may come directly to the declarations and adjudications of our own court under the constitution of 1849 and the laws passed in accordance with its mandate, and we find Chief Justice Field, whose study of this Spanish-Mexican system was as profound as his mastery over it was complete, declaring "the interest of the wife is a mere expectancy like

the interest which an heir may possess in the property of his ancestor." (*Van Maren v. Johnson*, 15 Cal. 308.) Soon thereafter Mr. Justice Cope, speaking for the court in *Packard v. Arellanes*, 17 Cal. 525, says: "So long as the community exists her interest is a mere expectancy and possesses none of the attributes of an estate either at law or in equity. This was held in *Van Maren v. Johnson*, before referred to, where the interest of the wife was compared to that which an heir may possess in the property of his ancestor. This same doctrine prevails in Louisiana and appears to be an established principle of the civil and Spanish law." And again Mr. Justice Thornton, speaking for the court in *Greiner v. Greiner*, 58 Cal. 119, says: "The interest of the wife during the same period (coverture) was a mere expectancy, like the interest which an heir may possess in the property of his ancestor."

It is thus apparent that the construction put upon the constitution of 1849 and the laws passed thereunder is identical with that declared in *Estate of Burdick*, 112 Cal. 87, [44 Pac. 734]; and *Spreckels v. Spreckels*, 116 Cal. 339, [58 Am. St. Rep. 170, 48 Pac. 228]. The constitution of 1879 does not, as did the constitution of 1849, command the legislature to pass laws defining the wife's rights in the community property because, as for thirty years those laws had been upon the statute books and as the rights under those laws had been from a very early date judicially determined and settled, no need existed in the new constitution to call for legislative action upon the matter.

For these reasons it is impossible to perceive where or how the inheritance law under consideration does violence to any provision of the constitutions of California of 1849 or 1879 or to any provision of the constitution of the United States.

The order and decree appealed from are affirmed.

Shaw, J., Angellotti, J., Sloss J., Lorigan, J., and Beatty, C. J., concurred.

Rehearing denied.

[S. F. No. 4883. In Bank.—April 20, 1908.]

In the Matter of the Estate of JOHN FLETCHER SIMS,
Deceased.

INHERITANCE TAX—WIFE'S SHARE OF COMMUNITY PROPERTY SUBJECT TO.
Estate of Moffitt, ante, p. 359, approved, to the effect that a wife's share of the community property is subject to the inheritance tax imposed by the act of March 20, 1905.

APPEAL from an order of the Superior Court of Alameda County directing payment of an inheritance tax. T. W. Harris, Judge.

The facts are stated in the opinion of the court.

Titus, Wright & Creed, and H. M. Wright, for Appellants.

U. S. Webb, Attorney-General, Snook & Church, and Everett J. Brown, for Respondent.

THE COURT.—This case presents the same question as that in *Estate of Moffitt, ante*, p. 359, [95 Pac. 653], this day decided,—namely, whether a surviving wife's share of the community property is subject to the inheritance tax. The decision of the trial court was to the same effect in both cases. For the reasons given in *Estate of Moffitt*, the order and decree appealed from are affirmed.

[S. F. No. 4821. In Bank.—April 20, 1908.]

CHARLES QUIST, Respondent, v. **DAVID B. MICHAEL**
et al., Cross-Complainants and Respondents; **H. H. HILL**
et al., Appellants.

APPEAL—DISMISSAL ON MOTION—FAILURE TO SERVE ADVERSE PARTY—EXAMINATION OF RECORD.—An appeal from a judgment will not be dismissed in advance of the hearing upon the merits, on the ground that the notice of appeal was not served upon an adverse party, when the determination of the question whether the party not served

was adverse or not necessitates an examination of the record. The objection may be urged at the time of the hearing on the merits.

ID.—NEW TRIAL—TRIAL ON AGREED FACTS—JURISDICTION—FRIVOLOUS APPEAL.—The trial court has jurisdiction to entertain a motion for a new trial of a case that was tried on an agreed statement of facts and a stipulation waiving findings, and the supreme court has likewise jurisdiction of an appeal from an order denying such motion. Such an appeal will not be dismissed, on motion, and the supreme court will not, in advance of the hearing on the merits, examine the record to determine whether or not it is frivolous. If it appears to be frivolous at such hearing, the respondent's right will be adequately protected by the imposition of a penalty.

MOTION to dismiss an appeal from a judgment of the Superior Court of Mendocino County and from an order refusing a new trial. J. Q. White, Judge.

The facts are stated in the opinion of the court.

McNab & Hirsch, for Appellants.

Thomas, Pemberton & Thomas, and Robert Duncan, for Respondent.

HENSHAW, J.—The appeals in the above-entitled case are from the judgment and from the order denying appellants' motion for a new trial. Respondents move to dismiss the appeals, the first upon the ground that Sandman, a defaulting defendant, was not served with notice of the appeal and is an adverse party whose rights will be injuriously affected by a reversal or modification of the judgment; the second upon the ground that the case was tried upon an agreed statement of facts, with a stipulation waiving findings, and that, as a motion for a new trial is a request to the court to re-examine an issue of fact, since here the facts are stipulated, an appeal from the court's order refusing to do so is a vain and useless thing.

As to the appeal from the judgment it is sufficient to say that the determination of the question whether or not defendant Sandman is an adverse party who should have been served, and whether or not, as between the appellants and the respondents actually served, a judgment could be rendered without affecting the rights of Sandman, necessitates an examination of the record. In accordance with the prac-

tice of this court in such cases, that examination will not be made in advance of the hearing upon the merits, but may be urged at the time of such hearing. (*Hibernia S. and L. Soc. v. Behnke*, 118 Cal. 498, [50 Pac. 666]; *Kenney v. Parks*, 120 Cal. 24, [52 Pac. 40].) It is ordered, therefore, that the motion to dismiss the appeal from the judgment stand over, to be renewed, heard, and decided when the case is presented upon its merits.

As to the motion to dismiss the appeal from the order of the court refusing to grant a new trial, it is manifest that the trial court had jurisdiction to entertain the motion for a new trial, and by appeal from its order this court has acquired jurisdiction to review the action of the trial court. Under these circumstances a motion to dismiss does not lie. If it shall prove, as respondents argue, that the appeal is a vain and useless thing, the result will be an affirmance of the order of the trial court. The appeal having been properly taken, and jurisdiction by this court having been acquired, we will not look into the record to determine the merits of respondents' contention. If it shall appear that the appeal was frivolous and taken merely for vexation and delay, a respondent's right in such a case will always be adequately protected by the imposition of a penalty. The motion to dismiss the appeal from the order refusing to grant a new trial is therefore denied.

Sloss, J., Shaw, J., and Angellotti, J., concurred.

[Crim. No. 1411. In Bank.—April 20, 1908.]

THE PEOPLE, Respondent, v. DELFINE ALBITRE,
Appellant.

APPEAL—CRIMINAL LAW—FAILURE TO FILE BRIEF OR APPEAR ON ARGUMENT.—The failure of the appellant in a criminal case to file a brief on his appeal or to appear on oral argument is sufficient reason for affirming the judgment and order refusing a new trial appealed from.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. B. N. Smith, Judge.

The facts are stated in the opinion of the court.

No appearance for Appellant.

U. S. Webb, Attorney-General, for Respondent.

THE COURT.—The defendant was convicted of murder in the first degree, and adjudged to suffer death. He appeals from the judgment and from an order denying his motion for a new trial. No brief having been filed in support of the appeal, the matter was submitted by the attorney-general upon the transcript, without oral argument, there being no appearance for defendant. The failure of defendant to file a brief or to appear on oral argument constitutes under our law sufficient reason for affirming the judgment and order. (Pen. Code, sec. 1253.) We have, however, carefully examined the record. The evidence contained therein amply warranted the verdict, and there is nothing to indicate that any substantial error was committed in the proceedings of the trial court.

The judgment and order are affirmed.

[Sac. No. 1617. In Bank.—April 24, 1908.]

HOWARD K. JOHNSON et al., Petitioners, v. L. P. WILLIAMS, as County Auditor of the County of Sacramento, Respondent.

COUNTY INDEBTEDNESS—LEGISLATIVE CONTROL—ROAD AND HIGHWAYS OUTSIDE OF MUNICIPALITIES—RECOURSE TO GENERAL FUND.—It is within the power of the legislature to authorize recourse by a county to its general fund, consisting almost entirely of taxes collected from all parts of the county, for work on its public roads and highways lying outside of the limits of municipalities within the county. Instances of the exercise of such power may be found in sections 2643, 2647 and 2716, of the Political Code.

ID.—DOUBLE TAXATION.—There is no double taxation caused by such an expenditure to the owners of property within a municipality.

ID.—BONDED INDEBTEDNESS OF COUNTY—CONSTRUCTION OF ROADS, BRIDGES, AND HIGHWAYS.—Under section 4088 of the Political Code, enacted March 18, 1907 (Stats. 1907, p. 382), authorizing any county to incur a bonded indebtedness for any purpose, for which the board of supervisors are herein authorized to expend the funds of said county, "or for the purpose of building or constructing roads, bridges or highways," a county may issue its bonds, payable by means of a tax levied on all the property of the county, including that within municipalities, for the purpose of building or constructing roads, bridges, or highways; and it is immaterial that there has been no modification or repeal of section 2 of the Highway Act of February 28, 1883, which simply prohibits the inclusion of a municipality within a road district of the county, or the collection therein of the county road poll-tax, or the property tax for county highway purposes levied annually by the board of supervisors.

ID.—REPAIRING BRIDGES—GENERAL FUND AVAILABLE FOR.—Under section 2712 of the Political Code, the board of supervisors of a county are authorized to expend money in the general fund of the county, collected from all parts of the county including municipalities, for repairing bridges, under the circumstances and in the manner provided by that section; and may issue the bonds of the county for the purpose of making such repairs, in pursuance of the authorization contained in section 4088 of that code, to the effect that a bonded indebtedness may be incurred "for any purpose for which the board of supervisors are authorized to expend the funds of said county."

ID.—DETERMINATION OF SUPERVISORS FOR RESORT TO GENERAL FUND.—Where the proceedings for the issuance of county bonds for repairing bridges were ordered and instituted by the unanimous vote of the board of supervisors, such action will be taken as a determination by the whole board of the facts authorizing resort to the general fund for such purpose, in compliance with the requirements of section 2712 of the Political Code.

ID.—PROVISION FOR PAYMENT OF INTEREST—GENERAL TAX LEVY—CONSTITUTIONAL REQUIREMENTS.—The object of section 18, article XI, of the constitution, providing that no county indebtedness or liability exceeding the income or revenue provided for the year shall be incurred, "unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due," or is simply to insure provision annually, at the time of the general tax levy, for such money as would be necessary to pay interest and principal falling due before the time of the next general tax levy; and a county bond issue is not invalidated by the fact that the payment of interest might be deferred for a short time pending

proceedings for the collection of a tax for that purpose already levied, or by the fact that the payment of the first installment of the interest might be deferred until a general tax levy and collection thereunder because it fell due prior to the first general tax levy after the incurring of the indebtedness.

APPLICATION for a Writ of Mandate directed to the County Auditor of the County of Sacramento.

The facts are stated in the opinion of the court.

E. S. Wachhorst, District Attorney, W. H. Devlin, and J. B. Devine, for Petitioners.

H. C. Ross, for Respondent.

ANGELLOTTI, J.—This is a proceeding instituted in this court to obtain a peremptory writ of mandate requiring the defendant to attest and sign, as auditor of Sacramento County, certain proposed bonds of said county, which have been ordered issued by the board of supervisors, after such issuance had been authorized by the electors of the county at a special election held in the manner provided by the constitution and statutes. The auditor's refusal to perform this official action is based on his claims that the bonds cannot be legally issued, and the matter was submitted for decision upon a demurrer to the petition.

The proposed bonds are of three different kinds:—

First. Bonds to the extent of six hundred and sixty thousand dollars for the purpose of erecting and constructing a new county courthouse, and in connection therewith a new county jail in the said county of Sacramento.

Second. Bonds to the extent of six hundred thousand dollars for the purpose of building certain specified roads and highways in said county.

Third. Bonds to the extent of two hundred and twenty-five thousand dollars for the purpose of building and constructing certain specified bridges in said county, the itemized statement in this behalf describing the work as to some of the bridges to be "repairs."

The city of Sacramento is a municipal corporation existing under a freeholders' charter, and having its corporate bound-

aries within the boundaries of the county of Sacramento. Under the existing laws applicable to all municipalities, it is required to construct and maintain its own streets and bridges without aid from any county fund, and is exempt from certain road taxes by reason of the following provision of section 2 of the Highway Act of February 28, 1883,—viz. "Provided further, that nothing herein contained shall be deemed to authorize the levy or collection of a road poll-tax, or property road-tax, within municipalities existing under the laws of this state, wherein work and improvements upon the streets is done by virtue of any law relating to street work and improvements within such municipality. Nor shall any such incorporated city or town be by the supervisors of the county included or embraced in any road district by them established under this act." (Stats. 1883, p. 20.) The roads and bridges to be constructed and repaired are all outside of the corporate limits of the city of Sacramento. The proposed bonds of the county and the interest thereon are necessarily to be paid from taxes levied by the county on all the property in the county, including that within the corporate limits of said city. The principal contention of defendant is that the law does not authorize the issuance of county bonds payable from taxes to be levied on all the property of the county, including that situated in incorporated cities and towns, for the purpose of constructing roads, bridges, and highways, or repairing bridges.

It is apparent that no constitutional question is presented by this contention. It is undoubtedly within the power of the legislative department to authorize recourse by a county to its general fund, consisting almost entirely of taxes collected from all parts of the county, for work on its public roads and highways lying outside of the limits of municipalities within the county, and our statutes show several instances of the exercise of this power, the validity of which has never been challenged. Section 2712, of the Political Code, authorizes a portion of the cost of constructing or maintaining, or repairing any bridge, or the cost of purchasing a toll-road, to be paid under certain circumstances by the supervisors from the county general fund. Subdivision 10 of section 2643 authorizes the cost of waterworks, oil tanks, etc., for the sprinkling of roads and the cost of sprinkling to be charged to such fund.

The same subdivision authorizes the expense of a road three miles in length, the cost of which is too great to be paid out of the road fund, to be paid from the general county fund. Section 2647 of the Political Code contains a similar provision as to one half of the cost of fences constructed on certain public highways. There is no double taxation caused by such an expenditure to the owners of property within a municipality. What they are thereby caused to pay for the expense of public highways lying outside of the municipality is nothing more than their proportion of such expense as the legislative power deems should be borne by the whole county. The whole matter is purely one of statutory legislation.

Has the legislature authorized the issuance of county bonds for the purposes under discussion?

The proceedings for the issuance of the bonds in question were had under the provisions of section 4088 of the Political Code, enacted March 18, 1907 (Stats. 1907, p. 382). That section provides that "any county may incur . . . a bonded indebtedness for any purposes for which the board of supervisors are herein authorized to expend the funds of said county, *or for the purpose of building or constructing roads, bridges or highways.*" The portion of this provision which we have italicized is new to our law, the corresponding section of the former County Government Act (County Government Act of 1897, sec. 13, Stats. 1897, p. 460) providing simply that such a bonded indebtedness might be incurred "for any purpose for which the board of supervisors are herein authorized to expend the funds of said county." Under the law last referred to, the cases of *Devins v. Board of Supervisors*, 121 Cal. 670, [54 Pac. 262]; and *Wright v. Sacramento County*, not reported, [54 Pac. 1030], were decided, and it was held therein that the statute did not authorize the issuance of county bonds for the construction of a county highway, the reason given being that the board of supervisors of Sacramento County were not authorized to expend the general fund of the county, collected from all parts of the county including municipalities, for such purposes. After these decisions, the legislature amended the law on the question by adding the words we have italicized above. It is manifest to us that these words were added for the express purpose of changing the statutes as they had been construed in the

Devine and Wright cases to the end that county bonds payable by means of a tax levied on all the property of the county including that within municipalities might be issued by any county for the purpose of "building or constructing roads, bridges or highways." This is the plain meaning of the words used without regard to prior decisions on the subject, but when the legislative action is viewed in the light of those decisions, there is no possible escape from the conclusion that we have stated. It is unimportant that there has been no modification or repeal of section 2 of the act of February 28, 1883, hereinbefore quoted. That section simply prohibits the inclusion of a municipality within a road district of the county, or the collection therein of the county road poll-tax, or the property tax for county highway purposes levied annually by the board of supervisors (Pol. Code, secs. 2651-2655), and its provisions are in no way affected by the later enactment. We are satisfied that section 4088 of the Political Code authorizes the issuance of the bonds of Sacramento County for the purpose of building or constructing roads, bridges, and highways therein.

The amendment of 1907 does not, in terms, authorize the issuance of county bonds for the purpose of "repairing" bridges already constructed. As we have seen, a portion of the two-hundred-and-twenty-five-thousand-dollar issue for bridge purposes was for such repairs, and it is claimed that the rule of the Devine and Wright cases is applicable thereto. We may assume, without deciding, that the issuance of bonds for "repairs" of bridges is not authorized by the provision for such issuance for the purpose of "building or constructing" bridges. But the section also authorizes such issuance "for any purposes for which the board of supervisors are herein authorized to expend the funds of said county." Section 2712, of the Political Code, provides: "Whenever it appears to the board of supervisors that any road district is or would be unreasonably burdened by the expense of constructing, or by the maintenance and repairs of any bridge . . . they may, in their discretion, cause a portion of the aggregate cost or expense to be paid out of the general road fund of the county, or by vote of two thirds of the board of supervisors, said board may, in their discretion, order a portion of the cost of construction and repairs of bridges . . . to be paid out of

the county general fund as well as the general road fund." By this section the board of supervisors of Sacramento County are authorized to expend money in the general fund of the county, collected from all parts of the county including municipalities, for repairing bridges, under the circumstances and in the manner provided by the section. The proceedings for the issuance of these bonds were ordered and instituted by the unanimous vote of such board, and this must be taken as a determination by the whole board of the facts authorizing resort to such general fund for the purpose indicated. Under these circumstances, the issuance of bonds for repairing bridges was permitted by that part of section 4088 which authorizes the issuance of bonds for any purpose for which the board are authorized to expend the funds of the county.

The only remaining objection is one made to all the bonds, based on the provisions of section 18, of article XI, of the constitution. This section provides that no indebtedness or liability exceeding the income or revenue provided for the year shall be incurred, "unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal," etc. The section of the Political Code under which these proceedings were had (sec. 4088) provides, following the constitutional provision, for the levy of a tax by the board of supervisors "at the time of making the next general tax levy after incurring the indebtedness," and annually thereafter, for the purposes of paying the bonds and interest, which "must not be less than sufficient to pay the interest on said bonds, and such portion of the principal, if any, as is to become due before the time for making the next general tax levy." It further provides: "And the board of supervisors, before or at the time of issuing said bonds by ordinance shall provide for the levy of an annual tax sufficient to effect the objects of this provision." The petition in this proceeding shows that the board of supervisors did, at the time of making the order prescribing the form of bonds and coupons, etc., October 7, 1907, adopt an ordinance providing for the levying of an annual tax commencing with the general tax levy to be made in September, 1908, sufficient for the purposes stated, as well

as for the purpose of paying all interest accruing on such bonds. This ordinance was adopted subsequent to the general tax levy for the year 1907, which by law is required to be made in the month of September of each year, and the provisions therein for an annual tax fully complied with the requirements of the constitution and the statute as to the principal, and as to all interest falling due after the first half of the year 1908. But the proposed bonds were to bear date December 10, 1907, with interest payable semi-annually, and the first interest coupon on each bond would, by its terms, be due and payable on June 10, 1908, if such bond had been sold and delivered prior to that date. The result would be that the tax to be levied for the purpose of paying interest would not be available at the time the first installment of interest became due. It is upon this fact alone, as we understand it, that the claim of the defendant that the constitutional requirement has not been complied with rests. We are of the opinion, however, that there was a substantial compliance with the requirement of the constitutional provision. The provision was adopted in the light of the rule which has always existed in this state for an annual general tax levy. No levy at any other time than that of the general tax levy was contemplated. The object was simply to insure provision annually, at the time of such general tax levy, for such money as would be necessary to pay interest and principal falling due before the time of the next general tax levy, and to place in the sinking fund for the payment of the principal the amount required by law. That the payment of interest might be deferred for a short time pending proceedings for the collection of a tax for that purpose already levied, or that the payment of the first installment of the interest on the bonds might be deferred until a general tax levy and collection thereunder because it fell due prior to the first general tax levy after the incurring of the indebtedness, were not matters being guarded against by the framers of the constitution. The important thing was that a tax sufficient to pay the interest and principal falling due, and to make up the necessary sinking fund, should be levied and collected annually, and this we are satisfied was all that was intended by the provision under discussion. Under this construction of such provision, the proceedings for the incurring of the

indebtedness were in compliance with the constitutional requirement.

This disposes of all the objections made by the defendant to the proposed bonds. It follows that the plaintiff is entitled to the relief sought.

Let the peremptory writ of mandate issue in accord with the prayer of the petition, requiring the defendant forthwith to attest and sign, as auditor of Sacramento County, the bonds and interest coupons therein described, and to do and perform such other acts in the premises as are required of him as such auditor.

Sloss, J., Shaw, J., Henshaw, J., Lorigan, J., and Beatty, C. J., concurred.

McFarland, J., dissented.

[S. F. No. 4643. Department One.—April 27, 1908.]

F. K. BARTHEL, Respondent, v. BOARD OF EDUCATION OF THE CITY OF SAN JOSE et al., Appellants.

PUBLIC SCHOOLS—TEACHER HOLDING CITY CERTIFICATE—REMOVAL.—

Under section 1793 of the Political Code, one holding a city certificate who is elected as a teacher in the public schools of the city for an indefinite term cannot be removed except for causes mentioned in that section and in section 1791 of that code.

ID.—TEACHER NOT HOLDING CITY CERTIFICATE.—Neither section 1793 of the Political Code, nor any other provision of the general state law precludes a city board of education from removing at pleasure a teacher who does not hold a city certificate.

ID.—ELECTION AND DISMISSAL OF TEACHERS—MUNICIPAL AFFAIRS.—The election and dismissal of teachers in the public schools are not "municipal affairs," which may, by a freeholders' charter, be regulated in a manner in conflict with that provided by the general law.

ID.—CHARTER OF SAN JOSE—PROBATIONARY TEACHER—POWER OF BOARD OF EDUCATION TO DROP.—Under section 13 of article IX of the charter of the city of San Jose, as amended in 1901, a probationary teacher, that is one in his first or second year of service in the

school department, who was appointed without holding a city certificate, can be dropped from the department by the board of education only on the adverse report of the classification committee.

APPEAL from a judgment of the Superior Court of Santa Clara County. A. L. Rhodes, Judge.

The facts are stated in the opinion of the court.

F. B. Brown, John E. Richards, and F. H. Benson, City Attorney, for Appellants.

Partridge & Jacobs, for Respondent.

SLOSS, J.—The plaintiff, in November, 1902, applied to the superior court of Santa Clara County for a writ of mandate requiring the board of education of the city of San Jose, and its members, to admit plaintiff to the position of principal of the Washington School in said city, or an equivalent position, and to draw its order upon the proper officer directing the payment to plaintiff of three months' salary as such teacher. Plaintiff's claim was that he had in July, 1902, been elected and employed as a teacher in the San Jose school department, and that the defendants had prevented him from performing his duties as such teacher. The salary claimed was at the rate of one hundred dollars per month for the months of July, August, and September, 1902.

An alternative writ issued, and, the defendants answering, the matter came on for hearing. The court made findings upon which it entered judgment awarding plaintiff a peremptory writ of mandate as prayed. This judgment was entered in November, 1903. In the meanwhile, the plaintiff had at the expiration of the school year been duly removed by the board of education. These facts were shown to the court by the defendants, and, upon their motion, an order was made limiting the writ of mandate so that it omitted any direction requiring the reinstatement of plaintiff, but merely directed the board to draw its order upon the proper officer for the payment to plaintiff of the three months' salary claimed by him.

The defendants appeal from the judgment. There is no bill of exceptions, and the sole question is whether, upon the

facts alleged and found, the plaintiff was entitled to the writ directing the payment of the salary in question.

That the findings are responsive to the issues made by the pleadings is not questioned, and it will be sufficient, therefore, to briefly state the facts as found. On July 2, 1902, the board of education of the city of San Jose duly granted to plaintiff a city grammar-grade certificate, authorizing him to teach in any of the common public schools of said city. On the same day, and after the granting of said city certificate, plaintiff was, by said city board of education, duly elected and employed as a teacher in the schools of said city, "without any term specified." He had, on the thirtieth day of June, 1902, and again on the second day of July, 1902, prior to the granting of his city certificate, by separate orders of the board, been elected and employed as a teacher in the school department for the school year ending June 30, 1903, and had been assigned to the position of principal of the Washington School. The salary attached to such position was twelve hundred dollars per year, payable in equal monthly installments.

On July 30, 1902, the board passed an order purporting to remove and dismiss plaintiff, and to set aside the election of June 30, 1902. On August 5, 1902, said board adopted a resolution purporting to remove and dismiss all teachers (including plaintiff) elected on July 2, 1902. Plaintiff did not receive any notice prior to either attempted removal. No charges of any kind have ever been filed or made against him. On September 10, 1902, the schools in the city of San Jose were opened for the ensuing school year. Plaintiff presented himself at the Washington School, ready, able, and willing to perform his duties as principal, and has ever since been willing to perform these duties or those of a similar position, but the defendants have prevented him from so doing. His demand that he be permitted to perform such duties and for the payment of his salary, have been refused.

The contention of the appellants is that the plaintiff was rightfully removed by virtue of certain provisions of the charter of the city of San Jose. In so far as plaintiff's rights are based on his election of July 2, 1902, for an indefinite term, it is difficult to see how this contention can be maintained, in view of the fact that at the time of such election

the plaintiff was the holder of a city certificate, and as such was, by section 1793 of the Political Code, protected from removal except for causes mentioned in that section and in section 1791. (*Kennedy v. Board of Education*, 82 Cal. 483, [22 Pac. 1042]; *Fairchild v. Board of Education*, 107 Cal. 92, [40 Pac. 26].) It is not, and cannot be, claimed that the election and dismissal of teachers in the public schools are "municipal affairs," which may, by a freeholders' charter, be regulated in a manner in conflict with that provided by the general law. (See *Kennedy v. Miller*, 97 Cal. 429, [32 Pac. 558]; *Mitchell v. Board of Education*, 137 Cal. 372, [70 Pac. 180].)

It may be argued, however, that plaintiff's assignment to the particular position carrying the salary claimed, took place before his receipt of a city certificate, and that his right to recover such salary must rest on his election antedating such certificate. For the purposes of the present case we may assume this view to be correct.

Neither section 1793 of the Political Code nor any other provision of the general state law precludes a city board of education from removing at pleasure a teacher who does not hold a city certificate. (*Stockton v. Board of Education*, 145 Cal. 247, [78 Pac. 730].) We must look, then, to the charter of San Jose to see whether plaintiff, viewed as a teacher appointed without holding a city certificate, was removed pursuant to the provisions of that instrument.

The two elections of plaintiff taking place prior to his receipt of a city certificate in terms limited his employment to the school year ending June 30, 1903. Such limitation was valid. (*Marion v. Board of Education*, 97 Cal. 607, [32 Pac. 643].) Here, however, the board sought to dismiss the plaintiff from the department before the expiration of the school year. The charter provisions relied on to sustain its action are found in article IX of the charter. Section 5 of this article gives to the board of education power to employ, pay, and dismiss teachers, janitors, school census marshals, and such other persons as may be necessary to carry into effect the powers and duties of the board . . . "provided, that no election of a teacher or other person employed by the board shall be construed as a contract, either as to the duration of time or amount of wages of such person." (Stats. 1897, p.

621.) This section, standing alone, would probably authorize the board to dismiss teachers or other employees at will, but it is limited by section 13, reading as follows:—

“Teachers during their first and second years of service in the department, and all special teachers, shall be classed as probationary teachers, and may be dropped from the department on the adverse report of the classification committee by a vote of a majority of the board.

“Teachers who have been assigned to duty for more than two years, other than special teachers, shall be classed as permanent teachers, and shall hold their positions without re-election until removed in the manner hereinafter provided.

“No teacher shall be removed save at the close of the school year, who has not had at least one month’s notice of such contemplated action, nor shall any teacher’s salary be reduced, except when there is a corresponding reduction made in all the salaries in the same grade. A permanent teacher may be removed for cause by a majority vote of the board of education or upon the recommendation of the city superintendent and a vote of a majority of the board, or by a vote of four members of the board; a vote for removal shall be taken by ayes and noes, and the vote recorded in the minutes.” (Stats. 1901, p. 957.)

Section 13 of article IX of the San Jose charter, as originally adopted, was construed in *Stockton v. Board of Education*, 145 Cal. 347, [78 Pac. 730], but the section there considered was amended in 1901, and now reads as above set forth.

Under this section the plaintiff, who was in the first year of his service, is to be classed as a probationary teacher. While there does not appear to be any great difference between “dropping” a teacher from the department, and “removing” him, so far as the effect on the teacher is concerned, the section does apply the latter term only to permanent teachers, and it is reasonable to infer that the clause protecting teachers from removal without prior notice, except at the end of the school year, was intended to refer only to permanent teachers. The purpose of the section, as regards teachers newly appointed, is to provide a period, during which they are on trial or probation, to be retained if their work is satisfactory, or dismissed if they fail to show their

fitness to the satisfaction of the board. During this period of probation their tenure must necessarily be uncertain. They may, long before the expiration of a year, prove their inability to do the work required of them. To hold that, in such case, they must have a month's notice of the contemplated dismissal would bring about a result which is not required by the language of the section and seems at variance with its purposes. The facts that no charges had been made against plaintiff and that he had received no prior notice of a contemplated removal did not, therefore, prevent his being dropped from the department.

But, under any construction that can be given to section 13, the power to "drop" a probationary teacher is not absolute. Authority to take such action is given to the board, or a majority of its members, only "on the adverse report of the classification committee." During the year for which plaintiff was appointed by the orders antedating his certificate, an adverse report of this committee was the condition upon which depended the power of the board to dismiss him. One of the issues raised by the pleadings was whether or not every step necessary to give the board jurisdiction to remove plaintiff had been taken. While there is no finding dealing specifically with the matter of an adverse report by the classification committee, the findings, read as a whole, may fairly be said to show that no such report had been adopted. This construction should be given to the findings, in order that they may support the judgment. (*People v. McCue*, 150 Cal. 195, [88 Pac. 899].)

It follows that, regardless of the effect of the city certificate, the plaintiff, who had been duly elected for the year ending June 30, 1903, was not legally removed from his position, and was therefore entitled to an order for the payment of the salary demanded.

The judgment is affirmed.

Angellotti, J., and Shaw, J., concurred.

[S. F. No. 4722. Department One.—April 27, 1908.]

VICTOR CASTRO, Appellant, v. EDSON ADAMS et al.,
Respondents, and CLINTON C. TRIPP, Cross-Com-
plainant, Appellant.

**ACTION TO QUIET TITLE—MEXICAN GRANT—CONVEYANCE BY PLAINTIFF—
MORTGAGE BACK—INSUFFICIENT POSSESSION—NONSUIT.**—In an
action to quiet title under a Mexican grant, where it appears
that the only title the plaintiff had thereunder, he had conveyed to
third parties, who had executed a mortgage back to plaintiff, such
mortgage passed no title; and where the plaintiff shows no other
title or possession, except that of an adobe house, not shown to be
situated on the Mexican grant, and no patent appears to have
issued for such grant, the plaintiff was properly nonsuited.

**ID.—CROSS-COMPLAINT BY ASSIGNEE OF MORTGAGE—PAYMENT OUT OF
SALES—CONSTRUCTIVE TRUST—LIMITATIONS—STALE DEMAND—NON-
SUIT.**—Where the cross-complainant claimed as assignee of the mort-
gage, which by its terms was payable out of sales, alleging that
numerous conveyances were made, but not showing when they were
made, or what prices were realized, it must be presumed that all
conveyances were made within a reasonable time, and when there
was a delay of over thirty-five years to demand an accounting, even
though a constructive trust was relied upon, growing out of a
breach of a parol interest by parties in confidential relation, the
statute would begin to run against such trust, from the time of such
breach, and the cause of action being barred by the statute of
limitations, and the suit being upon a stale demand in equity, a
nonsuit of the cross-complainant was properly granted.

APPEAL from a judgment of the Superior Court of Contra
Costa County. J. V. Coffey, Judge presiding.

The facts are stated in the opinion of the court.

Galpin, Elkins & Frost, and Philip G. Galpin, for Plaintiff,
Appellant.

Richard P. Henshall, for Cross-Complainant, Appellant.

Charles E. Wilson, and W. S. Tinning, for Respondents.

SHAW, J.—This action was begun on August 8, 1888. The
amended complaint states a cause of action against a large

number of persons, to quiet title to a tract of land, comprising a Mexican grant known as "Rancho el Sobrante." It alleges that the plaintiff is in possession and is the owner in fee of the lands. Clinton C. Tripp filed a cross-complaint alleging that he is the owner and holder of a mortgage upon the land for forty thousand dollars, executed by former owners in November, 1853, which is due and unpaid, and asking for a foreclosure thereof. The complaint and cross-complaint were each unverified and the respective adverse parties thereto answered by a general denial and also set up the several statutes of limitations which the respective defendants deemed a bar to the action. The cause came on for trial, the plaintiff and cross-complainant each introduced evidence and rested, whereupon, on motion of the adverse parties, the court gave judgment of nonsuit against both the plaintiff Castro and the cross-complainant, Tripp.

The appeals from this judgment are taken by Tripp and Castro separately. The judgment was rendered on September 25, 1891, but for some unexplained reason it was not entered until March 21, 1906. Victor Castro had died in the mean time, and the appeals in his behalf are taken by Julia B. Galpin, as executrix of his will and as his successor in interest. A bill of exceptions showing the evidence taken at the trial was settled and filed on September 12, 1893.

The plaintiff offered evidence tending to show that prior to November, 1853, he and one Juan Jose Castro were the owners of the land, under a grant of the Mexican government made in 1841, and that proceedings were pending before the United States land commissioners, in 1853, to have their grant confirmed and obtain a patent for the land from the United States. He then introduced a deed executed on November 23, 1853, by himself and Juan Jose Castro, whereby they conveyed the lands to John B. Frisbie and Ramon de Zaldo. He also introduced another instrument, executed on the same day as the deed, by Frisbie and De Zaldo to the two Castros, purporting to mortgage to the Castros the same land to secure the payment of the sum of forty thousand dollars by them to the Castros as soon as that sum should be realized from sales of the land to be made by the said mortgagors. Tripp claims as the holder of this instrument.

The motion for nonsuit as to the plaintiff was upon the ground that the evidence was insufficient to establish title in him. The only title he ever had was conveyed to Frisbie and De Zaldo by the deed above mentioned. The instrument executed on the same day by Frisbie and De Zaldo to him and Juan Jose Castro was merely a mortgage and vested no title or interest in the land in the mortgagees. This proposition was settled by the decision in the case of *Adams v. Hopkins*, 144 Cal. 32, [77 Pac. 712], a case to which the present appellants were parties and in which they asserted the same rights in this land under the same instruments. There is no evidence sufficient to show that any title or interest in the land ever thereafter became vested in the plaintiff.

In the briefs it is asserted that there was evidence that he was in possession at the time the action was begun, and it is suggested that this possession is *prima facie* evidence of title. The plaintiff testified that in November, 1853, at the time the deed was executed, he lived in a house on the San Pablo road in Contra Costa County, which he described as "my adobe house," and that, at the time of the trial, in September, 1891, he lived in the same house, and that "Besides myself and my brother, Juan Jose Castro, there were in 1853 other parties in possession of a portion of this ranch." There was also given in evidence a petition of plaintiff and Juan Jose Castro, filed with the board of land commissioners in May, 1852, which alleged that they were then in possession of the ranch, and a decree of the land commission, made in July 3, 1855, confirming the claim of the petitioners under the Mexican grant. This was all the evidence tending to show title by possession. The statement of Castro as to present possession was a mere incidental remark and referred only to a house in which he lived on the San Pablo road. The ranch comprised some twenty thousand acres, and there is nothing to show that the house was situated on the ranch, or, if it is situated thereon, that he ever occupied a foot of the land outside of the house. The petition to the land commissioners and the decree of that board were introduced to show a confirmation of the title under the Mexican grant and not to establish possession. It is not shown who were parties to the proceeding

and the decree would not be evidence of possession against persons who were not parties. The statements in the petition refer only to the possession in 1852 and not afterward. The trial took place nearly forty years after that date. There is no presumption that he continued in possession after making the deed of November 23, 1853. It is clearly apparent from all these circumstances, and from the entire case as presented by the record, that there was no real attempt in the court below to show title by proof of possession. The evidence on the subject is much too vague and shadowy to justify a reversal of the judgment of nonsuit. The nonsuit was properly granted as to the plaintiff.

The nonsuit as to Tripp was granted on the ground that the evidence showed no title in him, and that his right to foreclose the mortgage of Frisbie and De Zaldo, conceding him to be the holder thereof, was barred by the statute of limitations, and that the evidence showed that he was not the owner or holder of the mortgage.

The mortgage set forth in the cross-complaint provided that the forty thousand dollars was to be paid "as soon as the same shall be realized from the sales made by" the mortgagors of the ranch lands and that the mortgagors should pay over to the Castros the proceeds of sales from the ranch, until the whole sum was paid. Any sum of money received upon a sale of any part thereof was due to the Castros as soon as it was received by Frisbie and De Zaldo. No time was prescribed wherein sales were to be made by them. The law would imply an understanding that it should be within a time that would be reasonable under all the circumstances. The cross-complaint alleges that Frisbie and De Zaldo "subsequently" made conveyances whereby they conveyed the property to the numerous defendants, some two hundred in all, some of whose names were unknown, and it does not state when these conveyances were made, whether in separate tracts to the respective defendants, or jointly to all by several conveyances of different interests, nor does it give any explanation of the cross-complainant's inability to make more explicit statements as to the conveyances and parties, the dates when they were made, the prices realized, and the disposition of the purchase money,

or any circumstances which would excuse the delay in bringing the action. The evidence is also devoid of any such explanation. There was a delay of over thirty-five years. If it is conceded, or assumed, in the absence of such explanation, that a reasonable time might have extended to a period as long as five years after the execution of the instrument, the statute would begin to run at the end of that time and the action would have been barred seven times over by the statute of limitations. Both the cross-complaint and the case as established on the trial indicate that the suit is a stale demand upon which equity should refuse to grant any relief.

It is argued that the transaction as explained by Castro was of such a nature that a constructive trust in the land was established in his favor. This, if true, would not avoid the bar of the statute nor remove the laches. If a constructive trust arose at all by virtue of that transaction, it was because Frisbie and De Zaldo occupied fiduciary or confidential relations toward Castro and violated an agreement to execute an express parol trust to sell the land and pay a part of the proceeds to Castro. Equity might raise a constructive trust in favor of Castro, upon the failure of the grantees in the deed to perform the void parol trust, if confidential relations did exist as claimed. But, in such case, the breach of the parol agreement would at once set in motion the statute of limitations as to the constructive trust. They would be required to sell the land within a reasonable time. Their conceded failure to pay over the money within the extreme period of thirty-five years, with no showing of any reason for the delay, in connection with the averment that they sold all the property at some indefinite time after the inception of the trust, furnished at least presumptive evidence that the constructive trust and the obligation to pay had arisen, and that the bar of the statute of limitations and of the equitable doctrine of laches began to run against the enforcement of it many years before the period prescribed by the statute and the rules of equity.

There is no evidence in the record that the patent for the ranch from the United States was ever issued in pursuance of the decree of confirmation. The case is therefore to be decided upon the basis of the equitable rights and titles

of the appellants, without regard to the issuance of such patent. The arguments based upon the fact that the patent was of recent issue are without foundation and must be dismissed without further consideration.

All the rights involved and asserted by the appellants here were asserted by them in an action in the same court, to which they were parties, for the partition of the same land, entitled *Adams v. Hopkins*. The complaint in that action was filed in 1888, a few days before the beginning of this action. That action was tried and an interlocutory decree of partition was made and entered therein denying any relief to the appellants in this action. They appealed from that decree to this court. The same points and questions that are presented upon these appeals were presented upon the appeals in that case, were elaborately argued, and were given prolonged consideration by this court, a rehearing having been twice granted in the case. It was finally decided adversely to Castro and Tripp on all points and the judgment was finally affirmed on July 1, 1904. (*Adams v. Hopkins*, 144 Cal. 32, [77 Pac. 712].)

The judgments of nonsuit are affirmed.

Angellotti, J., and Sloss, J., concurred.

Hearing in Bank denied.

[Crim. No. 1417. In Bank.—April 27, 1908.]

THE PEOPLE, Respondent, v. JOHN SIEMSEN, Appellant.

CRIMINAL LAW—MURDER—MOTION TO SET ASIDE INFORMATION—DATE OF COMMITMENT—QUESTION OF FACT—PRESUMPTIONS—CONFLICTING EVIDENCE.—Though an order holding the defendant to answer upon a charge of murder is prerequisite to the filing of the information against him, yet the date of such order is a question of fact to be determined by the trial court, upon a motion to set aside the information; and notwithstanding defendant's counsel testified that the order was not signed when the information was filed, but it purports on its face to be indorsed on the complaint two days prior to the information, the presumptions that official duty was regularly done and that the order was truly dated, constitutes sub-

stantially conflicting evidence to the contrary, and the finding of the trial court to the contrary, in denying the motion, is conclusive upon appeal.

ID.—VOLUNTARY CONFESSION—PRELIMINARY PROOF—QUESTION OF FACT—DISCRETION OF TRIAL COURT—IMPOSSIBILITY OF FIXED RULE.—

Though it is essential that the preliminary proof must show that the confession by the defendant was voluntarily made, without previous inducement or intimidation, yet the question whether such preliminary proof is sufficient to show that the confession was free and voluntary, is one of fact addressed to the trial court, and a considerable measure of discretion must be allowed in the determination thereof. The admissibility of such a confession depends so largely upon special circumstances, that no fixed rule can be formulated covering all cases.

ID.—STATEMENT OF DEFENDANT UPON CONFESSION OF CO-DEFENDANT.—

The statement of the defendant voluntarily made, while in custody, upon being informed of the confession of a co-defendant voluntarily made by the latter, implicating the defendant with himself, made in the presence of the co-defendant, and admitting the truth of what he said, if shown not to have been induced by fear or promises, was properly admitted in evidence.

ID.—CONFESSION WHILE UNDER ARREST.—The mere fact that the confession of defendant was made to a police officer, while under arrest, does not necessarily render it involuntary; nor does the mere fact that the defendant was informed, in the presence of his co-defendant that the latter had confessed, make the defendant's subsequent confession necessarily involuntary.

ID.—MURDER IN ROBBERY OF BANK—EVIDENCE—POSSESSION AND EXPENDITURE OF MONEY—CORROBORATION OF CONFESSIONS.—Where it appears that the murder was committed upon a bank officer, in pursuance of a conspiracy by the defendants to rob the bank, which robbery was successfully accomplished, evidence of the sudden possession by the defendants of large sums of money, and expenditures made therefrom, corresponding to the facts stated in the confessions made by the defendants, was admissible in corroboration of such confessions, without necessary preliminary proof that they were impecunious before the robbery.

ID.—STATEMENT BY DISTRICT ATTORNEY NOT MISCONDUCT.—It appearing that the alleged confessions by both defendants were admissible in evidence against the defendant, it was not misconduct on the part of the district attorney in his opening statement to refer to the confession made by the co-defendant and to state its purport, and that he would prove it.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Carroll Cook, Judge.

The facts are stated in the opinion of the court.

J. J. Greeley, and A. P. Wheelan, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, for Respondent.

SLOSS, J.—John Siemsen and Louis Dabner were, by information filed in the superior court of the city and county of San Francisco, charged with the murder of M. Munekata. Upon a separate trial, Siemsen was found guilty of murder of the first degree, and he appeals from the judgment of death pronounced pursuant to the verdict, and from an order denying his motion for a new trial.

1. Upon being arraigned the defendant moved to set aside the information. His motion was denied, and this ruling is now assigned as error. The ground of motion was that before the filing of the information the defendant had not been legally committed by a magistrate, or more specifically stated, that the information was filed "before any commitment, deposition, or other record showing that said defendant had a preliminary examination, had been returned or filed, and that no order of commitment was indorsed upon an alleged paper purporting to be a complaint." Section 809 of the Penal Code provides for the filing of an information within thirty days after a defendant "has been examined and committed, as provided in section 872 of this Code." Section 872 directs that "if, however, it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must make or indorse on the complaint an order signed by him," holding the accused to answer the charge. It seems to be settled by the decisions of this court that the making of such order, signed by the magistrate, is a prerequisite to the valid filing of an information. (*Ex parte Brannigan*, 19 Cal. 133; *People v. Wilson*, 93 Cal. 377, [28 Pac. 1061].) In so far as the section "provides that the order shall be indorsed upon the deposition, the statute may be regarded as directory; but it is essential that it should be reduced to writing, and entered either upon the official docket of the magistrate or upon the complaint or depositions." (*People*

v. *Wilson*, 93 Cal. 377, [28 Pac. 1061]; see, also, *People v. Wallace*, 94 Cal. 497, [29 Pac. 950].)

It appears that the information was filed on the third day of December, 1906. The complaint which formed the basis of the preliminary examination was produced at the hearing of the motion to set aside the information. Indorsed upon this complaint was a written order, signed by the magistrate, holding the defendants to answer. This order was, on its face, in full compliance with section 872, and bore date of the first day of December, 1906, two days prior to the filing of the information. To overthrow the apparent regularity of the proceedings, the defendant called as a witness his counsel, J. J. Greeley, who testified that the information had been filed in the superior court at about five minutes before ten o'clock, on the morning of December third, and that at that time the "commitment," or order holding the defendant to answer, had not been signed; that he had seen the complaint in the police court at about 10:30 o'clock on the same morning, and that the signature of the magistrate had not then been affixed to it. E. P. Shortall, a police judge, who had presided over the preliminary examination, testified that he had no independent recollection of the time when he signed the order, but thought he had signed it on the afternoon of December first. "The only thing that calls it to my memory is the date on it." Whether the order holding defendant to answer was signed before or after the filing of the information was a question of fact to be determined by the trial court, and, if there was a substantial conflict of evidence on the point, the conclusion of that court must stand here. We think there was such a conflict. It is true that the testimony of Mr. Greeley was positive, while Judge Shortall expressed only a belief that he had signed the paper on December first, and based this belief on the fact that it bore that date. But the court, in determining whether or not to accept Mr. Greeley's testimony, had a right to consider the presumptions raised by law. One of these is that "official duty has been regularly performed"; another, that "a writing is truly dated." (Code Civ. Proc., sec. 1963, subs. 15, 23.) These presumptions, while disputable, are in themselves evidence (Code Civ. Proc., sec. 2061, subd. 2; *People v. Milner*, 122 Cal. 171, [54 Pac. 833]; *Sarraille v. Calmon*, 142 Cal. 651, [76 Pac. 497]; *Adams v. Hop-*

kins, 144 Cal. 19, [77 Pac. 712]; *Moore v. Gould*, 151 Cal. 723, [91 Pac. 616]), and will support a finding made in accordance with them, even though there be evidence to the contrary. It was for the trial judge to determine whether Mr. Greeley's testimony was sufficiently convincing to overcome the presumptions, (a) that the district attorney had properly performed his duty by withholding the filing of an information until an order had been signed by the magistrate, and, (b) that the order dated the first day of December had been signed on that day.

2. The prosecution offered evidence tending to show the following state of facts: M. Munekata was the manager and A. Sasaki the cashier of the Kimmon Ginko Bank, located at 1588 O'Farrell Street, in the city of San Francisco. The banking premises contained a private room, separated from the main business office of the bank by a partition of wood and glass. On October 2, 1906, Siemsen entered the bank, made some inquiries of the cashier in the main office, and visited the manager Munekata in the private office. At a few minutes before noon on the third of October, all of the employees and officers of the bank, with the exception of Munekata and Sasaki, went out for lunch, leaving Munekata in the private office, and Sasaki in the business office. About two thousand dollars in gold and several hundred dollars in silver were piled in boxes on a table beside the bank counter. At about half-past twelve one of the clerks returned and found Munekata and Sasaki unconscious and covered with blood. All of the money, with the exception of a few cents, had disappeared. On the floor was a piece of gas-pipe wrapped in paper. Siemsen and Dabner had been seen coming out of the bank at about five or ten minutes past twelve o'clock. The injured men were removed to the emergency hospital, where Munekata died within two hours. He had sustained an extensive fracture of the skull, which, with the resultant hemorrhage of the brain, was the cause of his death. Sasaki's skull was also fractured, but he finally recovered, and was a witness at the trial. The injuries were such as might have been caused by the piece of pipe found on the floor; they could not have been self-inflicted.

Siemsen was arrested on November 3 and taken to the O'Farrell Street police-station where his name was placed on

the "detinue book," so called. He was placed in a cell, but no charge was made against him. On the following day he was taken to the Bush Street police-station and placed in a cell with a guard outside to watch him. At his own request he was confined alone. The public was not permitted to visit him and the police captain in charge of the station testified that if an effort had been made he would not have allowed any one to communicate with him. "At no time," says this witness, "did he make a request for an attorney to be sent for. If he had asked for a lawyer, I certainly would have complied with his request." He was not threatened or abused in any way, in fact, as stated by the same witness, he was shown more consideration than "an ordinary prisoner." He was allowed to communicate with his wife by telephone.

On the day of the alleged confession Police Captain Duke sent for Siemsen. The chief of police and a detective were present. Captain Duke said "Siemsen, I suppose you have heard the boys outside calling out, extra papers, all about the confession of Dabner," and he said "Yes, I have heard it." Prior to that time Siemsen had refused to make any statement unless he received a promise that he would not be hanged and the police officers had refused to make any promise whatever. The alleged confession of Dabner had been reduced to writing and Duke read it to Siemsen. Siemsen stated that parts of it were not true, and on being asked what parts were not correct, specified an entirely unimportant detail. Duke then brought the co-defendant Dabner and his father into the room and re-read the confession in the presence of both defendants. Siemsen stated that he preferred to consult a lawyer before making any statement. The police officers made no reply to this and did not send for an attorney. Duke turned to Dabner and said: "Dabner, is this true?" and Dabner said "Yes, it is true," and looking at Siemsen, he said "Jack, you know it is true." Siemsen hesitated for a few seconds and finally said, "Well, that is the goods, that is true," or words to that effect and shook hands with the chief of police and with Duke, and, thereupon, at Duke's suggestion, signed his name "John Siemsen" to the statement under the words, "This statement is correct throughout," which Duke had first written. Captain Duke testified that he did not

hold out any inducement to Siemsen with reference to what he might state and made no promise of leniency, and made no threats, used no force, and did not put him in any fear. Chief of Police Dinan gave substantially the same testimony as Captain Duke. He also testified that after the signing of the confession newspaper men were admitted, and that in their presence, Siemsen stated that the confession was true, and that it was free and voluntary. Upon this showing the confession was admitted in evidence over defendant's objection. It was in substance as follows: That on the morning of October 3d Siemsen and Dabner left their home together, having planned on the preceding day to rob the Japanese bank. They waited around the bank until they saw the clerks go away and then went in. Siemsen stopped at the main or front office and told the Japanese there (Sasaki) that he wanted to see the manager. Siemsen and Dabner went back to the manager's office and Siemsen struck the manager over the head with a gas-pipe which Dabner had wrapped up in a piece of paper; then Dabner, following out the plan theretofore agreed on by Siemsen and himself, called the other Japanese back to the rear office. When he came back Siemsen struck him over the head several times and he fell. He then started to get up and Dabner struck him on the head with the pipe and he fell again. The defendants went through the till and got about two thousand two hundred dollars, partly in silver and partly in gold, which they put in a hand satchel. They then went to a place where they had left a horse and buggy in waiting and drove to the stable where they kept the horse and buggy. The satchel containing the money was concealed in a sack of oats. In the evening Dabner took it to the room occupied by Siemsen and himself and counted it. They subsequently spent various sums of this money for clothing and jewelry, the expenditures being stated by Dabner in detail.

The objection to the admission of this confession, and of the statements of Siemsen regarding it, was put upon the ground that the prosecution had failed to establish that the confession was free and voluntary on Siemsen's part, and that, on the contrary, the preliminary proof showed that it was made under duress. The objection was overruled and appellant excepted.

Upon the preliminary showing, which we have set forth with some fullness, it cannot be said, as matter of law, that the trial court erred in admitting in evidence the confession of Dabner, together with the statements of Siemsen regarding it. Undoubtedly, the rule is elementary, even in the absence of constitutional provisions protecting persons accused of crime, that "a confession, in order to be admissible, must be free and voluntary, that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." (3 Russell on Crimes, 6th ed., 478.) As was said by this court in *People v. Miller*, 135 Cal. 69, [67 Pac. 13], "before any confession of a defendant can be offered in evidence, it must be shown by the prosecution that it was voluntary, and made without any previous inducement or by reason of any intimidation or threat." The slightest pressure, whether by way of inducement to confess, or threat if confession is withheld, is sufficient to require the exclusion of the confession. Thus, the confession is not admissible if made in response to a statement by one in authority to the prisoner, that "it will be better for him" to make a full disclosure (*People v. Barrie*, 49 Cal. 343), or to tell all he knows (*People v. Thompson*, 84 Cal. 598, [24 Pac. 384]), or if called forth by a statement of the sheriff that he would do all he could for the prisoner. (*People v. Gonzales*, 136 Cal. 666, [69 Pac. 487].) But whether a confession is free and voluntary is a preliminary question addressed to the trial court and to be determined by it (*People v. Miller*, 135 Cal. 69, [67 Pac. 13], and a considerable measure of discretion must be allowed that court in determining it. The "admissibility of such evidence so largely depends upon the special circumstances connected with the confession, that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed, in the first instance, to the judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forbore to mark with absolute precision the limits of admission and exclusion. (*Hopt v. Utah*, 110 U. S. 574, 583, [4 Sup. Ct. 202].)

The testimony above recited shows, on the part of the officers, no express utterance amounting to either a threat or

an inducement. The claim is that Siemsen was placed in circumstances which necessarily operated to take from his actions the free and voluntary character which is required by the rule under consideration. Those circumstances are that he was in custody, charged, or to be charged with a serious crime, and that he was made aware that his co-suspect had made a confession implicating him. It is established law that the mere fact that the confession was made to a police officer while the accused was under arrest, does not necessarily render the confession involuntary. (*Hopt v. Utah*, 110 U. S. 574, 583, [4 Sup. Ct. 202]; *Bram v. United States*, 168 U. S. 532, [18 Sup. Ct. 183]; *People v. Devine*, 46 Cal. 46; *People v. Miller*, 135 Cal. 69, [67 Pac. 13]; *People v. Walker*, 140 Cal. 156, [73 Pac. 831].) Nor do we think the mere fact that the accused was informed, in the presence of his alleged accomplice, that the latter had confessed, requires the holding that the ensuing confession of this defendant was involuntary. It does not appear that he was, in any way, made to believe that his situation would be better if he confessed, or that it would be worse if he declined to speak. It may well be that a suspect, informed that a co-suspect has confessed, may feel impelled to speak for fear that silence on his part would give rise to inferences against him. Such fear might well be enough to take away from his resulting confession the voluntary character requisite to its admissibility. But it is also possible that he may fully understand that he is not called upon to say anything and that his silence could not be used against him. Here, as was stated by the police officers, the defendant, apparently knowing his rights, declined to say anything without first consulting counsel. Subsequently, without any pressure or suasion, other than a second reading of Dabner's confession, having been brought to bear on him, he decided to admit the truth of Dabner's statement. It cannot be said that the trial court was not justified in finding that this decision on Siemsen's part was voluntary, uninfluenced by either fear or hope induced by word or act of any of the officers. While the defendant, had, up to that time, been kept in close confinement, he had been placed alone at his own request, and had not been subjected to any indignity or unkind treatment. He had been allowed to communicate with his wife, and would, if he had desired, have been allowed

to see counsel. In this respect the case differs essentially from the "*Sweat Box Case*," 80 Miss. 592, [92 Am. St. Rep. 607, 32 South. 9], and *State v. McCullum*, 18 Wash. 394, [51 Pac. 1044], relied on by appellant. In each of these cases it was held that a confession induced by means of keeping the prisoner in a dark cell, or "sweat box," under circumstances leading him to believe that he would be kept there until he did confess, could not be used against him. The fact that Siemsen was confronted with Dabner and made to listen in Dabner's presence to the latter's confession is not of itself sufficient to establish the involuntary character of the appellant's admission of the truth of that confession. In *Bram v. United States*, 168 U. S. 532, [18 Sup. Ct. 183], the supreme court of the United States exhaustively reviewed the authorities on the general subject of the admissibility of extra-judicial confessions by persons accused of crime. In the opinion in that case there are some expressions indicating that a confession made by a prisoner immediately upon a statement by a police officer to the effect that an alleged witness had seen him commit the crime is not voluntary. But the facts of that case were very different from those here presented. It appeared that the police officer had stripped the accused of his clothing, and had said to him "If you had an accomplice, say so—do not have the blame of the crime on your own shoulders." That these circumstances were inconsistent with the exercise by the prisoner of a free will, uninfluenced by threat or promise, may well be. The situation is not the same, however, where the prisoner is treated with all the consideration shown to any prisoner, where no word is said to urge him to confess, where by his own declaration he indicates clearly his appreciation of the fact that he is not required to speak, where he has knowledge of his co-defendant's confession before he is told of it by the police officers, and where he has, in effect, adopted that confession and admitted its truth in all material respects before being confronted with the co-defendant, and before making any request to be allowed to see counsel. The fact that Siemsen said he preferred to consult a lawyer before making a statement, and that the police officers continued the interview without giving him an opportunity to obtain legal advice, would, if there had been no confession up to this point, undoubtedly be a circumstance entitled to considerable weight

in determining whether or not the police officers were withholding such advice from him as a means of inducing him, through fear, to assent to Dabner's confession. On the showing here made, however, there was clearly ample ground for the court to conclude that Siemsen's confession was the "spontaneous suggestion of the defendant's own mind, unmoved and uninfluenced by any inducement, promise, threat, or menace by the officer to obtain it." (*People v. Ramirez*, 56 Cal. 536, [38 Am. Rep. 73].)

3. After the introduction in evidence of Dabner's confession, assented to by Siemsen, the People offered the testimony of several witnesses to the effect that shortly after the alleged robbery and murder, Siemsen and Dabner had purchased various articles of jewelry and clothing, and had paid cash for the same. The sums so shown to have been expended amounted to more than one thousand dollars. In several instances this testimony was objected to on the ground that it had not been shown that the defendant was, prior to the alleged robbery, without means to make these purchases. That the sudden possession of money, immediately after the commission of a larceny, by one who had before that been impecunious, is admissible as a circumstance in the case (*People v. Kelley*, 132 Cal. 430, [64 Pac. 563]), is not disputed. Nor is it questioned that the same rule is applicable here, where, although the charge does not embrace larceny, the proof tends to show that, in the course of committing the crime under investigation, money was taken by the person or persons guilty of the main crime charged. It is urged, however, that before evidence of the possession of money by the defendant can be admitted, a foundation must be laid by showing that such defendant was impecunious before the commission of the alleged crime. It may be questioned whether this objection goes to the admissibility, or merely to the weight, of the evidence. This need not be decided here, however, since the evidence was clearly admissible upon another ground. All of the items of expenditure proven over defendant's objection corresponded, more or less closely, with the amounts which, according to the confession, had been paid by the defendants out of money taken by them from the bank. The evidence in question was relevant and proper for the purpose of corroborating the confession in this particular.

4. It is urged that the district attorney was guilty of misconduct, in that, in the course of his opening statement to the jury, he referred to the confession of Dabner and stated its purport. In view of our conclusion, above expressed, that the confession itself was properly admitted as against the appellant, it was, of course, not improper for the prosecuting officer to state that he would prove it.

No other point is made, and we see no reason for disturbing the verdict.

The judgment and order appealed from are affirmed.

Shaw, J., Angellotti, J., Lorigan, J., Henshaw, J., and Beatty, C. J., concurred.

[Crim. No. 1418. In Bank.—April 27, 1908.]

THE PEOPLE, Respondent, v. LOUIS DABNER, Appellant.

CRIMINAL LAW—MURDER—PLEA OF GUILTY—APPLICATION FOR WITHDRAWAL—DISCRETION.—Where the defendant charged with an atrocious murder in pursuance of robbery, had, contrary to the advice of several attorneys, and under the advice of his father, pleaded guilty of the crime charged, it was within the discretion of the court, when the defendant was called for sentence to be hanged, to refuse leave at that time to withdraw the plea of guilty and to substitute the plea of not guilty, where there is nothing in the evidence to mitigate the atrocity of the crime.

ID.—DISAPPOINTED HOPE—PRIOR GOOD CHARACTER—COLD-BLOODED MURDER NOT MITIGATED.—Neither the fact that the defendant had hoped to receive a life sentence, if he pleaded guilty, in which he was disappointed, nor the fact that he was young, and had borne a prior good character, could mitigate a cold-blooded, deliberate, and atrocious murder.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Carroll Cook, Judge.

The facts are stated in the opinion of the court.

G. P. Hall, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, for Respondent.

SHAW, J.—The defendant, and one John Siemsen, were jointly charged with the murder of one M. Munekata. Upon arraignment, Dabner pleaded guilty. Thereupon the court heard evidence to enable it to ascertain and determine the degree of the crime and upon the evidence taken declared it to be murder of the first degree without mitigating circumstances, and punishable with death. When subsequently brought before the court for judgment and sentence upon the said plea, the defendant asked leave to withdraw his plea of guilty and enter a plea of not guilty to the charge. Evidence and affidavits in support of, and in opposition to, this application, were introduced. The court refused to allow the withdrawal of the plea of guilty and pronounced judgment and sentence of death. The appeal purports to be taken from the judgment and also from the order refusing leave to withdraw the plea. The latter order is not appealable, but inasmuch as it can be reviewed on appeal from the judgment, the point is immaterial. A bill of exceptions, setting forth the evidence taken and proceedings had upon the inquiry as to the degree of the crime and upon the motion for leave to withdraw the plea, was duly settled and appears in the record on appeal.

The evidence shows that Siemsen and Dabner, about noon on November 3, 1906, entered a bank in San Francisco, known as the Japanese bank, which was then in charge of the deceased Munekata, who was its manager, and an assistant named Sasaki, and asked to see the manager on business. They were admitted to the manager's private office, which was in the rear of the premises, and Siemsen immediately struck Munekata on the head with a piece of gas-pipe which Dabner had procured the night before. Munekata was rendered unconscious by the blow and died therefrom shortly afterwards. Dabner, as soon as the blow was struck and Munekata fell back unconscious, called to Sasaki, the assistant, to come to the manager's office. He came and was also beaten over the head by Siemsen and rendered unconscious. Siemsen then took from the till some two or three thousand dollars and the two defendants

went off with it. The entire occurrence occupied but a few minutes and attracted no attention from the outside. The two had visited the bank the day before, for the purpose of observation to ascertain how the robbery could be accomplished, and had carefully planned the affair beforehand, even to the detail that Dabner was to call Sasaki to the manager's office as soon as Siemsen had stricken down the manager with the gas-pipe. There was no fact or circumstance connected with the commission of the murder that tends in the least degree to mitigate it. The only mitigating circumstance concerning the defendant was the fact that he confessed his crime when he was arrested. It was upon his confession that the details of the killing and the robbery were first disclosed. We cannot perceive that his subsequent confession has any bearing upon the question whether or not the crime itself was committed with deliberation and under circumstances which rendered it particularly flagrant and heinous. The court did not err in holding that it was murder of the first degree with no mitigating circumstances.

In support of the application to withdraw the plea of guilty, substitute a plea of not guilty, and go to trial before a jury, it was shown that the defendant was only eighteen years old, and that, until February, 1906, he had lived in or near the city of Petaluma, that he had there borne a good reputation for honesty, integrity, and good behavior and that he was not a strong-minded person, but was easily influenced by others. It was also claimed that he was insane. The grounds of his motion were that his plea of guilty was made through inadvertence, without due deliberation, in ignorance of the law and the consequences of such a plea, in obedience to the advice and instruction of his father, and in the belief that if he made that plea, a jury would be called to fix his punishment and that he would be sentenced only to imprisonment for life. Evidence was given tending in some degree to support some of these grounds. On the other hand, the record shows that when he was arraigned, an attorney was appointed by the court to represent him, that two days were given him to consider his plea, that at the expiration of the two days other counsel were appointed to act as his attorneys and the case was continued for two more days; that a de-

murrer was then filed and submitted without argument and overruled by the court, that the attorneys then stated to the court that the defendant wished to plead guilty, that this was against their advice and that they wanted to withdraw from the case. The court then asked the defendant, personally, if he wanted to plead guilty and he said that he did. The court then informed him that he could have other counsel if he desired it, and proceeded to explain to him, clearly and at length, that, if he pleaded guilty, it would be the duty of the judge of the court, and not a jury, to ascertain and determine whether the crime committed was murder of the first or second degree, and that, if it was determined to be of the first degree, the judge also would have to determine whether he was to be hanged, or sentenced only to life imprisonment, but that if he pleaded not guilty these questions would be decided by a jury. He was then directed to talk to his attorneys further about the matter, and after such conversation inform the court what he desired to do. He then talked with his attorney and again signified his desire to plead guilty, his attorney again declaring that he had advised against it. On the hearing of the motion he testified that in this conversation with his attorney he was advised that if he pleaded guilty the court would determine the crime to be murder of the first degree and sentence him to death by hanging, and that he fully understood what was said to him by the attorney and by the court, but that he was governed in the matter by the advice of his father. After the last statement by the attorney, the court again asked the defendant if he fully understood what he was doing and he answered that he did. His plea was then taken and entered of record, his attorneys immediately withdrawing from the case. The case was continued to the following day to take evidence, as to the degree of the crime. At that time the evidence was given, the degree of the crime and punishment was fixed as above stated, and the matter was continued two days for sentence. At the time fixed for sentence a different attorney appeared for the defendant and made the application for leave to withdraw the plea, as above stated.

It thus appears that the defendant was given five days for deliberation as to his plea, that during this time he had

the counsel and advice of three attorneys, all urging him to plead not guilty, that he was fully informed by them as to the difference in the procedure if he pleaded guilty, from that to be had if he pleaded not guilty, and that the court also explained to him the course of procedure. His own testimony taken in these proceedings indicates that he is a young man of at least ordinary intelligence and quickness of apprehension, while that of others tended to show that he was possessed of considerable shrewdness and cunning. It must be conceded that the court justly concluded that the defendant made his plea after ample time for deliberation and not in ignorance of the law, or facts, nor of the course of procedure to be followed, and with full knowledge thereof. Doubtless he was prompted by the hope that he would escape death and be condemned only to imprisonment, and he seems to have been induced to indulge this hope largely by the suggestions and advice of his father. But we do not think this fact of sufficient force to have required the court to permit a withdrawal of this plea after the event had proven that his hope was vain. If this were so, then the punishment upon a plea of guilty must always be something less than the greatest allowed by law, for the defendant, in pleading guilty, always hopes for less, and if his disappointment was sufficient to give the right to withdraw the plea, it would, in such a case, always be withdrawn. It was not until the court had declared that the penalty would be death, and after a subsequent delay of six days, that the defendant applied to withdraw and change his plea.

There was no contention to the effect that there was any serious doubt as to the defendant's guilt, or that evidence could be produced which would tend to prove that the offense was anything less than murder of the first degree, or even to mitigate its atrocity and lay the foundation for a verdict of imprisonment for life, except the claim that the defendant was insane and that prior to his departure from Petaluma, ten months before the time of sentence, he had borne a good reputation for honesty, integrity, and good behavior. The evidence of his insanity was very slight, but nevertheless the court appointed three physicians to examine him in that respect and they unanimously pronounced him sane. His previous good character might have some bearing on the

fact of his participation in the crime, if that were in doubt, but there is no pretense that he did not aid and assist therein with deliberation and previous knowledge of the character of assault which was to be made. A cold-blooded, cruel, and deliberate murder is not rendered any the less atrocious by the fact that the person committing it was previously of good reputation.

Section 1018 of the Penal Code provides that the court may at any time before judgment permit the withdrawal of a plea of guilty and a substitution of a plea of not guilty. It is a matter within the sound discretion of the court, and its action must be upheld unless an abuse of discretion is shown. The following remarks of the court in *People v. Miller*, 114 Cal. 16, [45 Pac. 987], are particularly applicable here: "The mere fact that a defendant, knowing his rights and the consequences of his act, hoped or believed, or was led by his counsel to hope or believe, that he would receive a shorter sentence or a milder punishment by pleading guilty than that which would fall to his lot after trial and conviction by jury, presents no ground for the exercise of this liberal discretion. (*People v. Lennox*, 67 Cal. 113, [7 Pac. 260].) To hold that it did would be equivalent to saying that a defendant might speculate upon the supposed clemency of a judge, with the right to retract if, at any time before sentence, he began to think that his expectation would not be realized. . . . Only after it is made manifest that defendant is to suffer the extreme penalty, and that no further delay will be permitted, do counsel produce the affidavit, itself made upon the day of the hearing, but not offered until that moment, and ask to be allowed to retrace all these steps thus advisedly taken. What conclusion can be reached except the one that because the court was about to pronounce sentence of death, defendant and his counsel, knowing that he could not fare worse at the hands of a jury, and might fare better, sought an opportunity to essay the other chance."

If we could perceive anything in the evidence which would have called for a lesser punishment than that the trial court was about to impose, some reason might appear why defendant should have been permitted to withdraw his plea and put his fate before a jury. No showing of this kind is made.

The record not only fails to show an abuse of discretion, but, to the contrary, from first to last makes manifest that the trial judge, placed in an unusual and trying position, conducted all of the proceedings with a just and even solicitous regard for the defendant's rights, and ruled as alone it was permissible for him to rule under the facts before him.

The defendant's acts indicate that he is not so dangerous or vicious as his co-defendant Siemsen. His voluntary confession seems to have been full and frank. These facts might have aroused in the mind of the court some degree of sympathy for him, and perhaps, if a jury had considered the case, such sympathy might have been sufficiently potent to have saved him from the death penalty. But the comparison with his partner in crime does not establish the fact that his own acts were not sufficiently atrocious to deserve the severest penalty, but only to show that there were degrees of viciousness to which his disposition and capacity did not carry him. His voluntary confession does not lessen or soften the character of his crime. But, whatever its effect may be, it was addressed to the discretion of the court below, and it is not of sufficient weight to control our action to such an extent as to justify us in declaring that that discretion was abused. The responsibility in such matters rests upon the superior court. This court has no function to perform regarding it, except to see that the discretion of that court is not unreasonably exercised. As a matter of law the action of the superior court is justified by the facts. If an appeal is to be made to sympathy and sentiment it can only be done on an application for clemency and mercy addressed to the executive department of the state.

The judgment and order are affirmed.

Angellotti, J., Sloss, J., Lorigan, J., Henshaw, J., and Beatty, C. J., concurred.

[S. F. No. 4624. In Bank.—April 27, 1908.]

ANDREAS ZIHN, Appellant, v. CLARA G. ZIHN et al.,
Respondents.

DEED OF GIFT—POSSESSION RAISES PRESUMPTION OF DELIVERY.—A deed of gift which is in the possession of the grantees is presumed to have been delivered, and the burden is on the grantor, seeking to invalidate such deed for want of delivery, to rebut this presumption.

ID.—DELIVERY QUESTION OF FACT—EVIDENCE—FINDING.—The question of the delivery of the deed is one of fact to be determined by the trial court, and where the evidence is substantially conflicting, the finding of the trial court is conclusive. In this case, the finding that the deed in question was delivered is held sustained by the evidence, as is also the finding that it was untainted by fraud.

ID.—DEED FROM FATHER TO DAUGHTERS—CONFIDENTIAL RELATIONS—PRESUMPTION OF FRAUD—EVIDENCE TO REBUT PRESUMPTION.—In an action to set aside a deed of gift from a father to his daughters on the ground of fraud, any presumption of fraud arising from the admitted allegations of the complaint respecting the confidential relations of the parties may be rebutted, and the effect of the presumption, if any is raised, is merely to throw upon the donees the burden of showing that the gift was made freely and voluntarily, with full knowledge of all the facts, and with perfect understanding of the effect of the transfer. This requirement the donees in the present case have complied with, and the validity of the deed is not affected by a further finding that at the time of its delivery the parties agreed that the grantor should have a life estate in the property, and that the grantees should become the owners in fee subject to such life estate.

ID.—FINDINGS AS TO PROBATIVE FACTS.—In such an action, where judgment is rendered in favor of the defendants, it is immaterial that the evidence is insufficient to sustain certain findings relative to probative facts, which are of such a nature that a finding in favor of plaintiff thereon could not affect the clear and specific findings of ultimate facts in favor of the defendants.

ID.—EVIDENCE—QUESTION ALREADY ANSWERED.—The refusal to allow a witness on his direct examination to answer a question is not prejudicial error, if the subject-matter of the inquiry had already been fully covered in the prior examination of the witness.

APPEAL from an order of the Superior Court of the City and County of San Francisco refusing a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Charles G. Nagle, for Appellant.

Edwin L. Forster, and W. H. Cobb, for Respondents.

ANGELLOTTI, J.—This is an action to obtain a decree adjudging that the plaintiff is the owner of a lot of land, forty-three by about one hundred and fifty feet, on Twelfth Street, in the city and county of San Francisco, and annulling a deed of gift of the same, purporting to have been executed by plaintiff to his three unmarried daughters, defendants herein. Judgment went for defendants, decreeing them to be the owners in fee of said property, subject to a life estate in plaintiff therein, and plaintiff appeals from an order denying his motion for a new trial.

The complaint proceeds upon the theory that the deed of gift was never delivered by plaintiff to the daughters as a conveyance to them of the property described therein, but was simply given by him into their possession to be kept for him among his other papers, and not recorded, until such time as he was ready to deliver it to them, they promising to so dispose of and keep it, and he by reason of his trust and confidence in them, relying on their promise to do so. It contains allegations of the confidential relations existing between plaintiff and his unmarried daughters, and the reasons why he was induced to sign and acknowledge the deed and give it to them for safe keeping, but these allegations all apparently go to the ultimate fact alleged that there was no valid delivery of the deed, and not to the proposition that there was an executed conveyance induced by fraud or undue influence.

The trial court found that on the fourth day of January, 1902, the plaintiff "made, executed and delivered to the defendants Clara G. Zihn, Emma A. Zihn and Elizabeth D. Zihn, as grantees, his certain deed of conveyance" of the property, "and that at the same time it was understood and agreed by and between the parties thereto that the plaintiff should have a life estate therein and that said grantees should become the owners in fee thereof, subject to plaintiff's life estate and right to use and occupy the same for his life,"

and further that "plaintiff unconditionally delivered said deed to said defendants, and it was not merely delivered to be placed among his papers for safe keeping and not to be recorded, and it was not agreed that it should be returned to him upon demand." These findings completely negative the allegations of the complaint as to want of delivery of the instrument, and plaintiff is forced to contend that they do not find sufficient support in the evidence given on the trial. There is no warrant in the record for any such claim. The deed was in the possession of the grantees, and therefore, presumably had been delivered. (*Ward v. Dougherty*, 75 Cal. 240, [7 Am. St. Rep. 151, 17 Pac. 193]; *McDougall v. McDougall*, 135 Cal. 319, [67 Pac. 778].) The burden was on plaintiff to rebut this presumption. This the trial court was fully justified in holding he had not done. Plaintiff was residing with his three unmarried daughters on this property, which had been for a long time the family home. His wife had died a short time before, and the only other heir was a married daughter, who is also a defendant herein, she having been granted an undivided interest in the property by the unmarried daughters. He was sixty-eight or sixty-nine years of age, possessed of other property, and, so far as appears, fully capable of understanding the nature of a transaction of the character under discussion. Great affection had always existed between him and his unmarried daughters, and he was apparently desirous of so arranging the title to this property that they would not be disturbed in their enjoyment thereof after his death. While the daughters suggested and requested that he make them a gift of the home, there is nothing in the record to indicate any undue influence or fraud, or anything inconsistent with the theory that all that he did was done by him freely and voluntarily and for the purpose of giving them a valid claim to the property. He went alone to the office of a notary, and, as alleged in the complaint, "having concluded to arrange said real property" "caused to be written" the deed of gift in question (a deed of gift absolute in terms and without reservation), subscribed and acknowledged the same, carried it to his home, explained it to the grantees therein named, and gave it into their possession. There was some little conflict between the evidence of plaintiff and that of

the daughters as to what was said at that time, but the testimony of the daughters was clear to the effect that he gave it into their possession without making any statement inconsistent with the theory that he was making a delivery of a conveyance to the grantees therein named, with the intent to vest in them the title of the property described therein. There was nothing in the relation of the parties or the circumstances surrounding the transaction as disclosed by the record to force a different conclusion. He himself testified that he said: "Here is the paper which you have been whining so much about." He also testified that he told them to take it, and keep it for him, put it among his papers, and not record it during his lifetime. But this was expressly denied by the grantees. No question in regard to the matter arose until he subsequently contracted a second marriage in the year 1904. He admitted in his testimony that he told his married daughter, when she suggested that he borrow some money for her on the property, that the property was in the other daughters' names. Immediately after his second marriage, and prior to any question arising as to the deed and prior to his discovery that it had been recorded, he obtained from the unmarried daughters a written promise and agreement that the property should be their "father's and his wife's and family's home during our father's Andreas Zihn's whole lifetime." The testimony quite clearly shows that this writing was prepared under his dictation and given at his suggestion, and was wholly inconsistent with the theory that the deed of gift had not been delivered to the daughters. The question of delivery is one of fact to be determined by the trial court, and where the evidence is substantially conflicting the finding of the trial court is conclusive.

It is contended that even if the deed was delivered, it should be set aside on the ground of fraud. As before stated this was not the theory of the complaint, but certain facts alleged therein as to the relations of the parties, some of which were admitted by failure to deny in the answer, are relied on. This being simply an appeal from an order denying a new trial, the only question that can be considered in this connection is whether the evidence was sufficient to support the findings made in regard thereto. The trial court

found upon this question "that plaintiff was not and is not unaccustomed to or inexperienced in business; . . . that the deed . . . was not executed by reason of any statement made by said defendants, as set forth in his said complaint, nor was it obtained by any threats, coercion or fraud, but was freely and voluntarily given in consideration of love and affection, and for the better maintenance and support of said defendants." Counsel for plaintiff has not pointed out in his briefs wherein the evidence is insufficient to support these findings, except in so far as he claims that certain admitted facts and other facts shown by evidence without conflict as to the confidential relations of the parties were sufficient to raise the presumption of fraud. Without conceding this, for the purposes of the decision, it may be admitted. The utmost effect of such presumption would merely be to throw upon the donees the burden of showing that the gift was made freely and voluntarily, with full knowledge of all the facts, and with perfect understanding of the effect of the transfer. (*Soberanes v. Soberanes*, 97 Cal. 140, [31 Pac. 910]; *Arellanes v. Arellanes*, 151 Cal. 443, [90 Pac. 1059].) The evidence amply warranted a conclusion that the defendants had fully complied with this requirement, and that the case was one of an absolute gift, made freely and voluntarily in the execution of a purpose to so dispose of the property, without the exercise of any fraud on the part of the grantees. Considerable reliance is placed by plaintiff in this connection upon the finding heretofore referred to that at the time of delivery of the deed "it was understood and agreed by and between the parties thereto that the plaintiff should have a life estate therein and that said grantees should become the owners in fee thereof, subject to plaintiff's life estate and right to use and occupy the same for his life." This finding, which is upon a matter not specifically referred to in any of the pleadings, does not necessarily imply any lack of understanding upon the part of the donor as to the effect of the absolute deed of gift, or that the deed as delivered was not fully in accord with the desire and intention of the grantor, but is entirely consistent with the fact of a separate understanding and agreement then assented to by the grantees, relying on which plaintiff was willing to make and knowingly and voluntarily made delivery of the absolute-

deed of gift, with the full understanding of its legal effect. The finding is apparently based upon the testimony of plaintiff that the understanding was that the place was to be his home as long as he lived, and the writing subsequently executed by the donees, to the effect that the property should be their "father's and wife's and family's home during our father's . . . whole lifetime." Although not material on this appeal, it may be noted that the judgment gives the plaintiff all that he can properly claim under such agreement,—viz. a life estate in the property.

Certain other findings attacked upon the ground of insufficiency of evidence relate to probative facts, and are of such a nature that a finding in favor of plaintiff thereon could not affect the clear and specific finding of ultimate facts in favor of defendants, as there would be no necessary conflict between such findings. (See *People v. McCue*, 150 Cal. 195, [88 Pac. 899].) They are, therefore, immaterial and need not be here considered.

What we have said in regard to the finding of the understanding and agreement at the time of the delivery of the deed disposes of another contention of plaintiff,—viz. that if the deed was delivered untainted by fraud, nevertheless it should be set aside on the ground that it did not express the intentions of the donor.

The only remaining contention of plaintiff relates to the ruling of the trial court in sustaining an objection to a question asked plaintiff, near the close of his direct examination, as follows: "And you never intended to deliver it to them, you say?" The matter under discussion was the question of the delivery of the deed of gift by plaintiff to the grantees, and the objection made was that it called for the conclusion of the witness. It is unnecessary to consider whether the ruling was technically erroneous, for certainly it was not prejudicial error. The subject-matter of the inquiry had been fully covered by the previous testimony of the witness, as the question itself indicated, the witness having testified substantially that he gave the custody of the deed to his daughters solely that they might keep it for him among the family papers, and he subsequently testified in effect that he did not want to deliver it, and allowed it to go into the possession of his daughters in order that they might put it

away among his private papers. It is apparent that an additional statement by him that he never intended to deliver it could not have affected the result.

The order denying a new trial is affirmed.

Shaw, J., Sloss, J., Lorigan, J., and Henshaw, J., concurred.

[S. F. No. 4607. Department One.—April 27, 1908.]

WENDLING LUMBER COMPANY, Appellant, v. GLENWOOD LUMBER COMPANY, Respondent.

ORDER GRANTING NEW TRIAL—APPEAL—REVIEW NOT LIMITED TO GROUNDS STATED.—In reviewing an order granting a new trial, the appellate court is not limited to the grounds expressly stated in the order, but may consider and determine any ground specified in the notice of intention, except that the ground for insufficiency of evidence cannot be reviewed, when the evidence is substantially conflicting.

ID.—ORDER GRANTED FOR INSUFFICIENCY OF EVIDENCE—SUPPORT OF VERDICT FOR MOVING PARTY—CHANGE OF JUDGE IMMATERIAL.—Where the order was granted for insufficiency of the evidence; and sufficient evidence appears to support a verdict for the moving party, notwithstanding conflicting evidence to the contrary, this court cannot interfere with the order; and the fact that the order was made by a judge other than the one who tried the case, is immaterial, and cannot extend the power of this court to interfere therewith.

TROVER—CONVERSION OF LUMBER—FRAUD IN PROCURING SALE—TRANSFER WITHOUT VALUE—NOTICE—AVOIDANCE OF TITLE—PLEADING—EVIDENCE.—In an action of trover for the conversion of lumber, when the complaint contains the usual averments, and the defendant denies plaintiff's ownership and the conversion, the plaintiff, without pleading that the property was acquired by a third party by fraud in procuring the sale thereof from plaintiff, and was transferred by him to the defendant without consideration, and with notice of the fraud, may prove these facts in avoidance of the title, as between the original parties, and as against the defendant, where the action was promptly brought.

1D.—EFFECT OF FRAUD IN SALE—TITLE FOR CERTAIN PURPOSES—ELECTION—DEFRAUDED PARTY.—The fraudulent sale passed the title sufficiently to protect a *bona fide* purchaser without notice of the fraud, and sufficiently to be confirmed in case of such long acquiescence and unreasonable delay by the party defrauded as to suggest the inference of his consent; though by prompt action of the vendor, upon discovery of the fraud he may elect to treat the sale as void, both as against the original purchaser, and as against a fraudulent vendee with notice.

1D.—ELECTION OF REMEDIES BY DEFRAUDED PARTY.—The defrauded party may elect between the civil remedies of trover, replevin in the *cepit*, replevin in the *detinet*, or trespass.

1D.—FRAUD NOT A PART OF CAUSE OF ACTION—ORDER OF PROOF.—The cause of action, in the remedy shown, does not rest upon fraud. The fraud comes in technically not as a part of the plaintiff's *prima facie* case, but by way of reply to any claim of the defendant resting upon the sale; yet this is a mere matter of order of proof.

1D.—SUFFICIENCY OF PROOF OF FRAUD—PRESUMPTION—CONFLICTING EVIDENCE.—The presumption of law is in favor of honesty and fair dealing, where there are no confidential relations; and the evidence of fraud must be more than sufficient to raise a suspicion. It is held that the evidence on the question of fraud was such as to make the decision of the trial court in the matter conclusive upon this court.

APPEAL from an order of the Superior Court of Santa Clara County granting a new trial. Hiram D. Tuttle, Judge.

The facts are stated in the opinion of the court.

Louis H. Brownstone, and B. A. Herrington, for Appellant.

Jackson Hatch, and Walter H. Linforth, for Respondent.

ANGELLOTTI, J.—This is an appeal by plaintiff from an order granting defendant's motion for a new trial in an action for damages for the alleged conversion of certain lumber. The order granting the new trial was made by the successor of the judge who presided at the trial of the cause, and was expressly made upon the grounds that the evidence was insufficient to sustain the verdict and that the jury did not follow the instructions of the court.

Defendant claims that the order granting a new trial was correctly made for a reason not specified therein,—viz. that the trial court erred in admitting certain evidence. It is true, as claimed by counsel, that in our review of the order we are not confined to the grounds specified therein by the court granting the motion, but will affirm the order if it was correctly made upon any ground upon which the motion was based (see *Weisser v. Southern Pacific Ry. Co.*, 148 Cal. 428, [83 Pac. 439], and cases there cited), the only limitation being that where the trial court has in its order expressly excluded the ground of insufficiency of evidence as a basis for its action, we will not consider that ground if the evidence was conflicting. We are, therefore, called upon to determine whether the trial court erred in admitting the evidence referred to.

The complaint was in the form ordinarily used in an action for the conversion of personal property, simply alleging the ownership and right to possession by plaintiff of the property on a day named, the wrongful deprivation and conversion to its own use of said property by defendant on that day, the market value of said property, a demand for the return of the property, and a refusal by defendant to comply therewith, the consequent damage, and non-payment of any part thereof. By its answer, defendant simply denied each of the allegations of the complaint except the one as to the value of the property, which it admitted to the extent of \$4,856.40, which was the amount of the verdict.

The theory of plaintiff's case was that one J. H. Routt, not a party to this action, had obtained such property from plaintiff by means of certain false representations, willfully made for that purpose, relying upon which plaintiff sold and delivered the property to Routt, that defendant received the property from Routt without giving any valuable consideration therefor, and with full knowledge of the fraud by means of which the same had been obtained, and that plaintiff upon discovering the fraud at once repudiated the sale, and, treating it as void because of the fraud, commenced this action for the wrongful conversion of the property. Over the objection of defendant, plaintiff was permitted to introduce evidence in support of this theory. It is the admission of this evidence that is alleged to have been

erroneous. The objection urged is that no fraud being alleged in the complaint, the evidence of fraud was incompetent under the pleadings, defendant resting upon the general rule that where fraud is relied on by a party he must allege it. We are satisfied that this rule is not applicable here. It appears to be thoroughly established that where a sale of personal property is procured by fraud, the ownership of the property is not changed and no title passes to the vendee, and the vendor retains his right in the property, unless after discovering the fraud he assents to and ratifies the act of sale, either positively or by such delay as would authorize the inference of assent. (See *Butler v. Collins*, 12 Cal. 457; and *Amer v. Hightower*, 70 Cal. 440, [11 Pac. 697], and authorities therein cited.) As was said in *Butler v. Collins*, *supra*, and approvingly quoted in *Amer v. Hightower*, *supra*, "the civil remedies of the party defrauded are clear, viz.: trover, or replevin in the *detinet*, or trespass or replevin in the *cepit*, at his election." One who acquires the property from the fraudulent vendee under such circumstances that he cannot be held to be a purchaser in good faith and for a valuable consideration, is in no better position than the fraudulent vendee, and the defrauded party has the same remedies against him that he had against such fraudulent vendee (See *Sargent v. Sturm*, 23 Cal. 359, [83 Am. Dec. 118]). It seems clear that in an action brought upon the theory that the vendor is the owner and entitled to the possession of the property, and that the defendant unlawfully withholds possession thereof, or has converted the same to his own use, the general allegations of ownership and right to possession, and unlawfully withholding or conversion are sufficient, and will render admissible proof of any facts sustaining such claim. It is elementary that a plaintiff is not required to anticipate in his complaint any defense that may be made by the defendant. (See *Canfield v. Tobias*, 21 Cal. 349.) The fact that a defendant owns and holds the property claimed because of a valid sale, or because he acquired the same from a fraudulent vendee, in good faith and for a valuable consideration, is purely a matter of defense, and when in such an action a defendant asserts any such claim, plaintiff can meet it by proof that such sale was void because of fraud, without having made

any allegation of fraud in the complaint. This is illustrated by the case of *Moore v. Copp*, 119 Cal. 429, [51 Pac. 630], an action to quiet title to land where the defendant set up in defense an agreement of sale, and plaintiff was allowed to introduce evidence in rebuttal showing that such instrument was obtained by fraud, without having alleged fraud in the complaint. The court, after saying that plaintiff could not know, when filing the complaint, that the defendant would answer, nor that, if he did, he would claim under the instrument in question, said that the principle governing the case was that stated in *Sterling v. Smith*, 97 Cal. 343, [32 Pac. 320], as follows: "No doubt, when a cause of action rests upon fraud, the facts constituting the fraud must be set up in the complaint; but such was not the case here, for the necessity of proving fraud appeared only after the answer of the defendant. And a plaintiff is in that position with respect to all new matters set up in the answer." The same is, of course, true as to the matters disclosed by evidence in behalf of a defendant properly given under denials contained in the answer. It is not correct to say in a case of the character before us that the plaintiff's cause of action rests upon fraud. It rests upon his ownership of the property and the conversion thereof by defendant, and fraud comes in only in reply to the defense that defendant is the owner by reason of an alleged sale by the plaintiff. Technically, proof of fraud as to such sale was not a part of plaintiff's *prima facie* case, and was available only in reply to any claim of defendant based on the sale, but this was a mere matter of order of proof. It is the general rule that in actions for the conversion of personal property where the property has been procured by fraud, it is not necessary to allege the fraud, but it is sufficient to declare generally, that the property was wrongfully converted. (See 21 Ency. of Plead. & Prac., p. 1087; *Salisbury v. Barton*, 63 Kan. 552, [66 Pac. 618]; *Pekin Plow Co. v. Wilson*, 66 Neb. 115, [92 N. W. 176]; *Hunter v. Hudson River Co.*, 20 Barb. 493; *Bliss v. Cottle*, 32 Barb. 323; *Benesch v. Wagner*, 12 Colo. 534, [13 Am. St. Rep. 254, 21 Pac. 706].) In our own case of *Amer. v. Hightower*, which was an action in replevin, the complaint was apparently destitute of allegation of fraud, and the judgment for defendant was reversed because of the rejection by the lower court of evidence offered

by the plaintiff tending to show fraud on the part of defendant in obtaining a bill of sale for and possession of the property. (See, also, *Nudd v. Thompson*, 34 Cal. 39; *Summerville v. Stockton Mill Co.*, 142 Cal. 547, [76 Pac. 243]; *Conner v. Bludworth*, 54 Cal. 635.) If *Burris v. Adams*, 96 Cal. 664, [31 Pac. 565], and *Burris v. Kennedy*, 108 Cal. 331, [41 Pac. 458], are at all inconsistent with the views herein expressed, in so far as they are so inconsistent they have been modified by *Moore v. Copp*, 119 Cal. 429, [51 Pac. 630]. The other cases relied on, with the exception of *Virginia Timber etc. Co. v. Glenwood Lumber Co.*, 5 Cal. App. 256, [90 Pac. 48], were clearly cases where the plaintiff's causes of action or the defendant's defense strictly rested on fraud, and the general rule requiring the allegation of the facts constituting the fraud was applicable. *Albertoli v. Branham*, 80 Cal. 631, [13 Am. St. Rep. 200, 22 Pac. 404], and *Wetherby v. Straus*, 93 Cal. 283, [28 Pac. 1045], are fair examples of this class of cases, each being a case where the claim of the defendant conceded the validity and completeness of a transfer as between the parties thereto, and it was sought to set the transfer aside or have it declared void in favor of creditors, on the ground that it was made with fraudulent intent. An action brought for the purpose of having a specified conveyance annulled on the ground of fraud would doubtless fall in the same class, but this is not such a case. The decision of the district court of appeal in *Virginia etc. Co. v. Glenwood etc. Co.*, 5 Cal. App. 256, [90 Pac. 48], is precisely in point, but we are unable to accede to the views of the learned district court of appeal therein expressed.

We cannot hold, however, that the trial court was not warranted in granting a new trial on the ground of insufficiency of evidence to sustain the verdict. To justify any interference of this court with an order granting a new trial on the ground of insufficiency of evidence, the case must be such as to compel us to hold that a verdict in favor of the moving party would not have found sufficient legal support in the evidence given on the trial. If the case be one where a verdict in favor of such moving party would have had such support the judge of the trial court is invested with absolute discretion in the matter, and, as has been heretofore said by this court, it was his duty to grant a new trial if he is not

satisfied with the verdict (*Condee v. Gyger*, 126 Cal. 546, [59 Pac. 26], and this court will not interfere with the action of the trial court in such cases, even if it believes that the weight of the evidence was the other way. The fact that the judge who heard and granted the motion was not the judge who presided at the trial in no degree extends our power in the matter. (*Churchill v. Flournoy*, 127 Cal. 355, [59 Pac. 791].) The burden was on plaintiff, of course, to establish the fraud on the part of Routt in the purchase of the lumber. The presumption of the law, except where confidential relations are involved, is in favor of honesty and fair dealing, and the evidence in support of the claim of fraud must do more than to create a mere suspicion thereof. (See *Levy v. Scott*, 115 Cal. 42, [46 Pac. 892]; *Casey v. Leggett*, 125 Cal. 671, [58 Pac. 264].) The fraud in this case consisted of various alleged misrepresentations of fact, said to have been material, and upon the faith of which plaintiff claims to have acted in parting with the lumber. We have examined the evidence in regard to these alleged representations, and so far as they may reasonably be held under the evidence to have been material, we find no reason to doubt that a verdict acquitting Routt of fraud would have had sufficient legal support. It would serve no useful purpose to here enter into an analysis of the evidence, and it is sufficient to say, as has been clearly stated in other cases, that the most that can be said for plaintiff's claim in this regard is that the case presented was one where the evidence on the subject of fraud was conflicting, and the decision of the trial court in the matter is conclusive upon us.

The order granting a new trial is affirmed.

Shaw, J., and Sloss, J., concurred.

The court in Bank denied a petition for rehearing May 27, 1908, upon which the following opinion was rendered:—

THE COURT.—In denying a rehearing, it is proper to state that what is said in the opinion relative to want of title in the vendee where a sale of personal property is obtained by fraud was said entirely with relation to the respective rights of the vendor and vendee. That title passes in such a case in the sense that the vendee in good faith and for a

valuable consideration of the fraudulent vendee takes a good title cannot be disputed. But as between the vendor and fraudulent vendee, or any person taking from such fraudulent vendee with notice of the fraud or without consideration, the sale may, at the election of the vendor promptly made, be treated as an absolute nullity.

[S. F. No. 4451. Department One.—April 28, 1908.]

BONESTELL, RICHARDSON & CO. (a Corporation), Respondent, v. CHARLES F. CURRY et al., Appellants.

PLACE OF TRIAL—ACTION AGAINST PUBLIC OFFICERS — ACT DONE BY VIRTUE OF OFFICE.—Section 393 of the Code of Civil Procedure, providing that actions against a public officer for an act done by him in virtue of his office, must be tried in the county where the cause, or some part thereof, arose, applies only to affirmative acts of the officer which directly interfere with the personal rights or property of the person complaining, such as wrongful arrest, trespass, conversion, etc., and does not apply to mere omissions or neglect of official duty.

ID.—ENJOINING PERFORMANCE OF ILLEGAL CONTRACT—COUNTY OF RESIDENCE OF DEFENDANTS.—An action by a taxpayer against the secretary of state, the assistant attorney-general and the state printer, and the members of a firm to which a contract for the furnishing of paper for use in the state printer's office had been awarded by such state officials, to enjoin further action in regard to or under said contract, upon the ground that the same was illegal and void, is not an action against public officers for an act done by them, but is an action against them and the other persons to prevent the doing of certain acts in the future. The proper county for the trial of such action, subject to the power of the court to change the place of trial on statutory grounds, is the county in which the defendants, or some of them, reside at the commencement of the action.

APPEAL from an order of the Superior Court of the City and County of San Francisco refusing a change of the place of trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, and George H. Sturtevant, Deputy Attorney-General, for Appellants.

M. H. Wascerwitz, Hiram W. Johnson, and C. K. Bonestell, for Respondent.

ANGELLOTTI, J.—This is an appeal from an order of the superior court of the city and county of San Francisco denying appellants' motion for a change of place of trial of the above-entitled action from said superior court to the superior court of the county of Sacramento. The action was one instituted in the superior court of the city and county of San Francisco against appellants, who were respectively secretary of state, assistant attorney-general, and state printer of the state of California, and the members of the partnership firm of A. Zellerbach & Sons, to which a contract for the furnishing of certain paper for use in the state printer's office had been awarded by appellants in their official capacity, to enjoin further action in regard to or under said contract, upon the ground that the same was illegal and void. The official acts of appellants in the matter were performed in the county of Sacramento, the place where they had their offices and transacted their official business. The defendants Zellerbach were residents of the city and county of San Francisco. The plaintiff corporation was a taxpayer of the state, and was engaged in the same line of business as A. Zellerbach & Sons, and claimed that it was the lowest bidder for the furnishing of the paper, and was itself entitled to the contract.

Appellants motion for a change of place of trial was based entirely on the provisions of section 393 of the Code of Civil Procedure, which, so far as is material here, provides: "Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial: . . . 2. Against a public officer, or person especially appointed to execute his duties, for an act done by him in virtue of his office; or against a person who, by his command or in his aid, does anything touching the duties of such officer."

This subdivision is not applicable to the case at bar. This action is not one against a public officer "*for an act done by*

him in virtue of his office" within the meaning of those words as the same are used in this law. It was held in *McMillan v. Vischer*, 9 Cal. 420, [70 Am. Dec. 655], that a similar provision in our Practice Act was not applicable to a proceeding in *mandamus* to compel a sheriff to execute a deed, the court saying through Field, J.: "The second subdivision of section nineteenth, which provides that actions against a public officer for *acts done* by him in virtue of his office shall be tried in the county where the cause or some part thereof arose, applies only to affirmative acts of the officer, by which, in the execution of process, or otherwise, he interferes with the property or rights of third persons, and not to mere omissions or neglect of official duty. (*Elliott v. Cronk's Admr.*, 13 Wend. 35; *Hopkins v. Haywood*, 13 Wend. 265.)" The cases cited, construing a practically similar New York statute, fully sustain the text. The provision was subsequently made a part of our Code of Civil Procedure in the light of the construction previously given by the courts, and with the intention, we must assume, that it should continue to be so construed. This construction contemplates only such affirmative acts of an officer as directly interfere with the personal rights or property of the person complaining, such as wrongful arrest, trespass, conversion, etc. The complaint in the case at bar shows no such case. Moreover, the action is not one against public officers for an act done by them, but is an action against them and certain other persons solely to prevent the doing of certain acts by such officers and by the other defendants in the future. It is thoroughly established, both by statute and by the decisions, that in all cases as to which express provision is not made to the contrary, the proper county for trial, subject to the power of the court to change the place of trial on account of convenience of witnesses, disqualification of judge, and inability to have an impartial trial (Code Civ. Proc., sec. 397), is the county in which the defendants, or some of them, reside at the commencement of the action. (Code Civ. Proc., sec. 395.)

The order denying appellants' motion for a change of place of trial is affirmed.

Shaw, J., and Sloss, J., concurred.

[S. F. No. 4685. Department One.—April 28, 1908.]

**REDWOOD CITY SALT COMPANY, Respondent, v.
ARTHUR L. WHITNEY et al., Appellants.**

PARTNERSHIP—PURCHASE BY PARTNERSHIP AND INDIVIDUAL MEMBER.—

A member of a partnership as an individual may unite with the partnership in the purchase of property for the joint benefit of the partnership and himself personally.

ID.—ACTION AGAINST PARTNERSHIP AND INDIVIDUAL MEMBER—PLEAD-

ING.—An action to recover the purchase price of goods sold to a partnership and one of its members individually, is properly brought against all the members of the firm as partners, and such member individually; and a complaint therein which properly alleges such a sale, is not uncertain, ambiguous, or unintelligible, and does not misjoin causes of action or parties.

ID.—FORM OF JUDGMENT—EVIDENCE SHOWING MERE SALE TO PARTNER-

SHIP.—In such an action, where the evidence shows merely a purchase by and delivery to the partnership, there is no liability on the part of the defendant sued individually except such as the law imposed upon him as a member of the partnership for a partnership debt, and judgment should not be entered against him for an individual as distinguished from a partnership debt.

ID.—MODIFICATION OF JUDGMENT ON APPEAL.—Where, in such an

action, judgment is entered against the partnership and also against the member individually sued, and the evidence shows merely a sale to the partnership, the court has power, on appeal, under section 578 of the Code of Civil Procedure, without directing an entire reversal of the judgment, to order its modification so that it shall be merely a judgment against the members of the partnership on their partnership liability.

ID.—EVIDENCE—REASONABLE VALUE.—The evidence reviewed and held

to show that the amount for which judgment was rendered was the reasonable value of the goods sold.

APPEAL from a judgment of the Superior Court of San Mateo County. George H. Buck, Judge.

The facts are stated in the opinion of the court.

Hewlett, Bancroft & Ballantine, for Appellants.

Ross & Ross, for Respondent.

ANGELLOTTI, J.—This is an appeal by all the defendants from a judgment in favor of plaintiff against them for the sum of \$2,215.20 for goods sold and delivered.

1. The action was against Arthur L. Whitney and Albion H. Whitney, copartners doing business under the name and style of C. E. Whitney & Co., and said Arthur L. Whitney, individually. The complaint alleged that the plaintiff "at the special instance and request of the defendants sold and delivered to the said defendants goods, wares and merchandise," the reasonable value of which was two thousand four hundred and ten dollars, and that no part of said sum had been paid. A demurrer on the grounds, 1. That several causes of action were improperly united in that a cause of action against Arthur L. Whitney and Albion H. Whitney as copartners, was joined with a cause of action against said Arthur L. Whitney, individually; 2. That there was a misjoinder of parties, in that said partners were joined as defendants with said Arthur L. Whitney, individually; 3. That the complaint was uncertain in that it did not appear therefrom whether the goods, etc., were sold and delivered to said partners or to Arthur L. Whitney individually; 4. That it was ambiguous for the same reason; and, 5. That it was unintelligible for the same reason, was overruled, and complaint is made of this ruling on this appeal.

There was no uncertainty, ambiguity, or unintelligibility in the complaint. It is susceptible of but one construction,—viz. that the goods were sold and delivered to the partnership, and Arthur L. Whitney as an individual, or, in other words, that Arthur L. Whitney and the firm of C. E. Whitney & Co., of which he was a member, jointly purchased the goods. We know of no reason why a member of a partnership as an individual cannot unite with the partnership in the purchase of property for the joint benefit of the partnership and himself personally. Certainly it would not be contended that property could not be purchased jointly by a partnership and a third person not a member of the firm, and there is no material distinction in this regard between the case of a third person and that of one who is a member of the partnership. The complaint states clearly, unambiguously, and intelligibly the simple case of a joint purchase by a partnership and an individual.

There was no misjoinder of causes of action. There was but a single cause of action stated,—namely, a cause of action for the reasonable value of goods sold and delivered, to *all*

the defendants, and there was no misjoinder of parties, for all of the parties jointly purchasing were necessary parties defendant. (See *Harrison v. McCormick*, 69 Cal. 616, 620, [11 Pac. 546]; *Cox v. Gille etc. Co.*, 8 Okl. 483, [58 Pac. 645].)

The demurrer, therefore, was properly overruled.

2. The verdict and judgment must likewise be construed as being against Arthur L. Whitney jointly with the partnership. It is contended that the evidence was not sufficient to support a conclusion of any joint purchase by the firm and Arthur L. Whitney individually. We think it is true that there was no substantial evidence to show anything but a purchase by and delivery to the partnership firm of C. E. Whitney & Co. This the evidence amply shows, with the result that each of the members of the firm, Arthur L. Whitney and Albion H. Whitney, was, jointly with his copartners, liable to plaintiff for the value of the goods. (Civ. Code, sec. 2442.) But there was no liability on the part of defendant Arthur L. Whitney except such as the law imposed upon him as a member of the partnership for a partnership debt. The judgment against him in so far as it may be a judgment for an individual debt as distinguished from a partnership debt is improper.

It does not follow, however, as appears to be assumed by appellants, that the judgment against the partners must be reversed. It is established that the common-law rule to the effect that in an action on a joint contract the plaintiff must recover against all or none of the defendants has been abrogated in this state, and that in such an action the plaintiff is entitled to a judgment against those of the defendants who are shown to be liable on the obligation. This is held to be the effect of section 578 of the Code of Civil Procedure, formerly section 145 of the Practice Act, providing that judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants. (*Lewis v. Clarkin*, 18 Cal. 399; *Shain v. Forbes*, 82 Cal. 577, [23 Pac. 198]; *Bailey Loan Co. v. Hall*, 110 Cal. 490, [42 Pac. 962].) This is undoubtedly the rule in this state, subject perhaps to the qualification that the defendants held liable are entitled to be protected against any material variance between the pleadings and the proof. (See *Chetwood v. California Nat. Bank*, 113 Cal. 424, [45 Pac. 704].) The

variance here was not material within the definition of that term in our Code of Civil Procedure (sec. 469), and judgment could properly have been given in the lower court against the partners alone, without any amendment of the complaint. (Code Civ. Proc., sec. 470.) This court may on this appeal vacate the judgment in so far as it purports to impose any liability on Arthur L. Whitney in addition to his liability as a member of the partnership of C. E. Whitney & Co., and leave the judgment in force in all other respects. (See *Nichols v. Dunphy*, 58 Cal. 605.) We have discussed this question upon the assumption that it is of some practical importance to Arthur L. Whitney that the judgment should be so changed as to relieve him from any such apparent additional liability. It appears to us that this assumption may be well based, and we are satisfied that he is entitled to have the judgment show clearly that the liability imposed thereby on him is solely one for the debt of a general partnership of which he is a member.

3. The only other point made for reversal is that the evidence was insufficient to show the value of the goods sold and delivered, which consisted of 777½ tons of salt. As already stated, the verdict was for \$2,215.20. Of the 777½ tons, 185 tons were what is known as half-ground salt,—salt that had been run through the crusher,—and it is admitted that the reasonable market value of such half-ground salt, delivered, as this was, at the works of plaintiff at Redwood City, was \$3.10 per ton, or a total for the 185 tons of \$573.50. There being an admitted credit to defendants of \$156.38 for work done by their employees in sacking the salt, there would be left \$1,485.32 of the verdict for the remaining 592½ tons, which would make the price of such salt, delivered in sacks at plaintiff's works, about \$2.50 per ton. We do not think that it can be held that there was not sufficient evidence that such salt so delivered was reasonably worth at least this amount. The original understanding between the parties appears to have been that the salt to be furnished should be half-ground salt, but as it was wanted immediately by defendants to fill an order for foreign shipment, and as it was impossible to run it through the crusher in time, Mr. Arthur L. Whitney, after a personal inspection of the salt at plaintiff's plant, authorized and directed the order to be filled by

the sacking and delivery of a lot of "drift" salt on hand, which he said was sufficiently fine for the purpose. He himself testified that, while in price there was *some* distinction between drift salt and half-ground salt, without stating how much, there was practically none in character, that one is often sold for the other, and that he did not know that any one could tell the difference. The salt delivered, for which recovery is here sought, was in fact used by defendants in filling the contract for half-ground salt for foreign shipment. It also appeared that defendants subsequently purchased from plaintiff salt of the same character as that here purchased for \$3.50 per ton. There was, it is true, evidence on the part of defendants that some of the salt delivered did not come up to the standard of the drift salt authorized, but there was nothing to indicate how much there was of this. There is enough in the record to support a conclusion that the unground salt delivered was generally the drift salt described by Mr. Whitney, and that such drift salt was reasonably worth in the market nearly, if not quite, as much as half-ground salt. In addition to this there was the positive testimony of Mr. Lovie, the secretary of plaintiff, that the market value of the 777½ tons of salt was \$3.10 per ton. Certainly we cannot say that a conclusion that the unground salt delivered was reasonably worth \$2.50 per ton does not find sufficient support in the evidence.

It is ordered that the judgment be and the same is hereby modified by adding thereto the following provision,—viz. "This judgment, so far as defendant Arthur L. Whitney is concerned, is one against him solely in his capacity as a member of the partnership of C. E. Whitney & Co., and imposes no individual liability on him other than such as is imposed by reason of his membership in said firm," and as so modified said judgment is affirmed.

Shaw, J., and Sloss, J., concurred.

[S. F. No. 3752. In Bank.—April 28, 1908.]

ANTONE GEORGE SEQUEIRA, Respondent, v. J. D. COLLINS and C. AUG. WEIHE, Appellants.

APPEAL FROM JUDGMENT—WANT OF JURISDICTION—DISMISSAL.—An appeal from a judgment taken more than six months after its entry must be dismissed for want of jurisdiction.

ACTION FOR CONVERSION OF BRICKS—ATTACHMENT—DEMAND UPON SHERIFF—WANT OF OWNERSHIP—TRANSFER AS SECURITY—CONTRACT FOR PLEDGE—POSSESSION.—An action for the conversion of bricks attached by the sheriff at suit of a former owner of the property on which the bricks were burned, for unpaid purchase money, cannot be maintained, where plaintiff was not the owner of the bricks attached, and did not have possession thereof when demand was made upon the sheriff for return thereof, but merely held a transfer of the owner's interest, and of bricks made and to be made, as security for advances, and for an interest in the bricks when sold, which was in effect a contract for a pledge not consummated by delivery and actual change of possession of the bricks made, as required by section 3440 of the Civil Code.

ID.—CONSTRUCTION OF CODE—TRANSFER OF PROPERTY NOT IN EXISTENCE—PLEDGE OF EXISTING PROPERTY.—Section 3440 of the Civil Code does not apply to a transfer of property not in existence as security; but when the property comes into existence, under a contract for a pledge thereof, that section applies and the delivery and actual and continued and open change of possession of the pledged property, must be the same as is required in case of sales thereof.

ID.—RETENTION OF POSSESSION AND CONTROL BY TRANSFERREE OR PLEDGOR.—The retention of the possession and control by the transferee or pledgor of personal property, after the transfer and pledge, without doing anything to indicate an intention to pass that control and dominion to the transferee or pledgee, is inconsistent with an actual possession in the transferee or pledgee, and cannot justify a finding thereof, as against an attaching creditor.

ID.—FINDING UNSUPPORTED BY CONCLUSIONS OF PLEDGEE.—The testimony of the pledgee to general statements that he had possession of the bricks and visited the premises, and gave directions to the men engaged in burning the same, is insufficient to show a change of possession, his general statement being his mere conclusions as to possession and it appearing that the pledgor maintained the control and dominion over the bricks without words indicating an intention to change it.

ID.—CHANGE OF POSSESSION OF BULKY PROPERTY.—Though it is not essential that bulky property should be removed from the premises in order to make a change of possession, yet it is essential that

there shall be an expression of the intention of the transferor to pass the possession and dominion thereof to the transferee.

APPEAL from a judgment of the Superior Court of Fresno County and from an order denying a new trial. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

H. U. Brandenstein, and Stanton L. Carter, for Appellants.

L. L. Cory, for Respondent.

SLOSS, J.—This is an action to recover damages for the conversion of six hundred and forty thousand bricks alleged to be of the value of four thousand dollars. The plaintiff recovered judgment for three thousand one hundred dollars and the defendants appeal from the judgment and from an order denying their motion for a new trial. The notice of appeal from the judgment was served and filed more than six months after the entry of judgment, and therefore conferred no jurisdiction on the appellate court to entertain this appeal.

The brick in question were in two kilns standing upon land in Fresno County. The defendant Weihe commenced an action against one Spinney to recover four thousand dollars with interest and costs and in that action caused a writ of attachment to be issued and placed in the hands of defendant Collins, the sheriff of Fresno County, for levy. Pursuant to this writ and to the instructions given by Weihe, Collins attached and took into his possession the two kilns of brick. The plaintiff, claiming to be the owner and entitled to the possession of the attached property, served upon the sheriff a demand for the release of the attachment, and, his demand being refused, he instituted this action.

The main question between the parties is whether certain transactions had between Spinney and the plaintiff prior to the levy of the writ of attachment operated to transfer to the plaintiff an interest in the brick which he could assert as against an attaching creditor. It appears without controversy that the land upon which the kilns were standing had originally belonged to defendant Weihe. In August, 1897, Weihe made an oral agreement with Spinney whereby it was agreed that Spinney should purchase from Weihe the land in ques-

tion for the sum of four thousand dollars with interest, payable in annual installments of one thousand dollars each. Spinney went into possession of the land under this agreement and remained in possession until after the levy of the writ of attachment. In 1901 Spinney commenced the manufacture of the brick in question, the material therefor being taken from the land. In May, 1901, some of the brick in one of the kilns being then in place but not yet burnt, he made an agreement with Sequeira, the plaintiff, whereby the latter agreed to advance the money necessary for the making of the brick. Two written instruments were executed. One of these purported to transfer to Sequeira all of Spinney's right, title, and interest in and to the contract with Weihe for the purchase of the land, and also his right, title, and interest in and to the brick made and to be made thereon. The other, after reciting the transfer, provided that it "is made as security for the performance on the part of the said first party (Spinney) of the agreement herein mentioned and to secure to said second party (Sequeira) all sums due and in any manner to become due from said first party to second party." By this writing, Sequeira agreed to advance, for the making of the brick, such sums as he might "deem best," and was to receive interest on all sums advanced, and one half of the net profits realized from the sale of the brick. The agreement in question further provided that Sequeira was to be and remain the owner of all brick made, and entitled to its possession until payment of all sums due him.

There is no room for controversy as to the legal effect of these instruments. While they purport to transfer the property, the transfer is plainly made as security, and operated to vest in the plaintiff only a lien. So far as the bricks are concerned, the writings are to be viewed as a contract for the creation of a pledge. (Civ. Code, sec. 2988.)

Sequeira made advances from time to time to pay for the expense of preparing, manufacturing, and burning the brick, his advances amounting in all to three thousand two hundred and seventy dollars. Spinney completed the moulding and laying of the brick in the first kiln, laid a second kiln, and proceeded to burn both. One of the kilns was finished in August and the other in September, 1901. The attachment was levied on the sixteenth day of April, 1902.

It is contended by the appellants that there had been no such "immediate delivery" or "actual and continued change of possession" of the property transferred, as is required by section 3440 of the Civil Code, to make the transfer valid as against a creditor of the transferrer. In this connection the court found "that said bricks were not in existence at the time the said agreements were so entered into and executed, and thereafter and long prior to this action and since said bricks were manufactured, the plaintiff took possession thereof, and ever since maintained the possession thereof down to the time when the defendant J. D. Collins took possession thereof in pursuance of the writ of attachment herein referred to." Section 3440, above referred to, requires a transfer of personal property to be accompanied by an immediate delivery and followed by an actual and continued change of possession, "if made by a person having at the time the possession or control of the property." If the property is not in existence at the time of the transfer it is obviously impossible that it should be in the possession and control of the transferrer, and the statute by its terms excepts transfers of such property from the requirement of immediate delivery. There is evidence here that at the time of the transfer only the first arch in one kiln had been laid and that this arch contained only eighteen thousand brick, none of which had been burned. We think this clearly brings the case within the exception of the statute and that no immediate delivery was required in order to make the transfer valid. (*Newell v. Desmond*, 74 Cal. 46, [15 Pac. 369].)

But, apart from the question of an immediate delivery, it was essential, in order to vest in plaintiff an interest in the property which would entitle him to hold it as against a creditor of Spinney, that he should have taken possession and held the bricks. The instruments under which the plaintiff claimed amounted, as has been said, to no more than a pledge of the brick. "A pledge is a deposit of personal property as security (Civ. Code, sec. 2986), and is dependent on possession, and is not valid until the property is delivered to the pledgee. (Civ. Code, sec. 2988.) The delivery must be as complete as is required in case of sales of personal property by section 3440 of the Civil Code, and change of possession must be continuous and open." (*Lilienthal v. Ballou*, 125 Cal. 183, [57 Pac. 897].)

The testimony relied upon to support the finding that plaintiff took and maintained possession is, in the main, that of the plaintiff himself. He stated that he took possession of the brick and always remained in possession of them until they were seized by the sheriff; that he went out to the land on which the bricks were being made "right along," sometimes at night, sometimes in the morning; that when there he would look around to see that everything was going along all right; that he went out every day during some weeks, and twice or three times a week at other times, sometimes staying and working on the premises all day; that he was there every night while the second kiln was being burnt; but that sometimes he did not go there for a month. That he was in charge of the brick. He employed some men to work on the kilns, but this was at the request of Spinney. He instructed the men not to lay the brick too close. It appeared, without controversy, that Spinney was in possession of the land on which the kilns stood, and was conducting some farming operations on the portion of the tract not used in making brick. There was no evidence that Spinney ever did any act or said any word indicating an intent to make an actual or a constructive delivery of the kilns to the plaintiff.

We think this testimony was insufficient to justify the finding that the plaintiff took or maintained possession of the brick. No importance is to be attached to his general statements that he had possession or was in charge. These are mere conclusions, and have no value if unsupported by the facts testified to. It clearly appears that Spinney, the man in possession of the land, commenced the manufacture of the bricks on that land, and carried that work to completion with the aid of men employed by him. There is nothing in the testimony of Sequeira to show that the possession of the brick ever passed from Spinney. There is no contention, and no basis for a contention, that Sequeira and Spinney were in joint possession, assuming that such joint possession would be sufficient. The claim that the plaintiff took possession must rest on the assumption that he took it from Spinney, with or without the latter's consent. But the record fails to show that Spinney's possession of the brick was not as full and complete at the date of the levy of the attachment as it had been at any prior time. The character of the possession which

must be taken by a pledgee in order to give him a valid lien is, as above stated, the same as that defined in section 3440 of the Civil Code. (*Lilienthal v. Ballou*, 125 Cal. 183, [57 Pac. 897].) That is to say, the change of possession must be actual, not merely constructive (*Bunting v. Saltz*, 84 Cal. 168, [24 Pac. 167]); it must be "open and unequivocal, carrying with it the usual marks and indications of ownership." (*Stevens v. Irwin*, 15 Cal. 503, [76 Am. Dec. 500]; *George v. Pierce*, 123 Cal. 172, [55 Pac. 775, 56 Pac. 53].) As was said in *McKee Stair Co. v. Martin*, 126 Cal. 557, [58 Pac. 1044], "there must be a visible and apparent change of the custody of the property, such as to give evidence to the world of the claims of the new owner." There was nothing in this case to show that Spinney did not at all times retain the full custody and control of the bricks. The mere fact that Sequeira gave some directions to the men engaged in the work cannot be given this effect, for it is not pretended that he ever supplanted Spinney in the general management of the work, or took its direction out of his hands.

We do not overlook the consideration that the acts necessary to constitute a change of possession depend upon the character and situation of the property transferred. "The law recognizes the fact that all species of personal property are not capable of the same kind of possession, and requires only that a purchaser or donee shall take such possession as the character and nature of the property admit of." (14 Am. & Eng. Ency. of Law, 2d ed., p. 374; *Chaffin v. Doub*, 14 Cal. 384; *Porter v. Bucher*, 98 Cal. 454, [33 Pac. 335]; *Dubois v. Spinks*, 114 Cal. 289, [46 Pac. 95].) Where the goods sold or transferred are bulky, or require further labor to fit them for use, it is not essential to a change of possession that they should be removed from the land of the transferor. (*Chaffin v. Doub*, 14 Cal. 384; *Porter v. Bucher*, 98 Cal. 454, [33 Pac. 335]; *Dubois v. Spinks*, 114 Cal. 289, [46 Pac. 95].) Nor can it be said that the mere fact that the transferor retains some measure of control over the goods conclusively establishes the absence of an actual and continued change of possession. (*Stevens v. Irwin*, 15 Cal. 503, [76 Am. Dec. 500].) In *Dubois v. Spinks* it was held that a quantity of cordwood had passed into the possession of the transferee, although the wood had not been removed from

the place where it had been piled. In *Tognini v. Kyle*, 17 Nev. 209, [45 Am. Rep. 442, 30 Pac. 829], the same rule was applied to the transfer of a large quantity of charcoal. In each of these cases, the vendor or transferrer, by words of delivery, or otherwise, turned over his possession to the vendee. Other cases of similar purport are cited. But it has never been held, at least in this state, that an actual change of possession has taken place where the transferrer, after the transfer, continues to exercise the same control and dominion over the property as before, and has done nothing to indicate any intention of passing that control and dominion from himself to his transferee.

Woods v. Bugbey, 29 Cal. 467, was a case, the facts of which were strikingly like those here presented. In holding that there had been no actual change of possession, the court used language which may well be applied to the case at bar: "In no case that we are aware of has the supreme court of this state laid down a rule requiring less than that the purchaser must have that possession which places him in the relation to the property which owners usually are to the like kind of property. In *Lay v. Neville*, 25 Cal. 552, the court, in reference to the subject, say: 'It was intended that the vendee should immediately take and continuously hold the possession of the goods purchased, in the manner and accompanied with such plain and unmistakable acts of possession, control and ownership, as a prudent *bona fide* purchaser would do in the exercise of his rights over the property, so that all persons might have notice that he owned and had possession of the property.' "

Testing the evidence by this rule, we are satisfied that it fails to show that the kilns ever passed from the possession of Spinney into that of Sequeira.

There is nothing in the case tending to raise the slightest doubt as to the good faith of plaintiff in taking the assignment of the brick as security for his advances. But the hardship of a particular case furnishes no reason for disregarding the provision of the statute which makes the lien of the pledgee dependent upon actual possession of the property pledged.

The conclusion reached makes it unnecessary to consider the other points made.

The appeal from the judgment is dismissed. The order denying a new trial is reversed.

Shaw, J., Angellotti, J., Henshaw, J., Lorigan, J., and McFarland, J., concurred.

[S. F. No. 4593. In Bank.—April 28, 1908.]

CRESCENT FEATHER COMPANY, Respondent, v.
UNITED UPHOLSTERERS' UNION, LOCAL NO. 28,
et al., Appellants.

APPEAL FROM ORDER DENYING NEW TRIAL—COMPLAINT AND FINDINGS CANNOT BE CONSIDERED.—Upon an appeal from an order denying the defendants a new trial the appellate court cannot consider either the sufficiency of the complaint or of the findings to support the judgment.

INJUNCTION—PICKETING BY LABOR UNION—FINDING UNSUPPORTED BY EVIDENCE.—In an action brought by a manufacturing corporation against a labor union and some of its officers and members to obtain an injunction restraining the defendants from interfering with the plaintiff in the conduct of its business by stationing pickets in the neighborhood of plaintiff's place of business, or otherwise molesting or interfering with any person or persons transacting business with the plaintiff, where the evidence entirely fails to show that the pickets had ever come in contact with or influenced any one desiring to deal with the plaintiff as a customer, and had not been stationed at or near the plaintiff's place of business for a week prior to the commencement of the action, a finding that such pickets "are still engaged in the acts complained of" is not sustained by the evidence, and an order refusing the defendants a new trial asked for on that ground will be reversed.

APPEAL from an order of the Superior Court of the City and County of San Francisco refusing a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

F. V. Meyers, for Appellants.

Bush Finnell, for Respondent.

CLIII Cal.—28

SLOSS, J.—This is an action brought by a manufacturing corporation against a labor union and some of its officers and members to obtain an injunction restraining the defendants from interfering with the plaintiff in the conduct of its business by stationing pickets in the neighborhood of plaintiff's place of business, or otherwise molesting or interfering with any person or persons transacting business with plaintiff. The plaintiff recovered judgment as prayed. A motion by defendants for new trial was denied and the defendants appeal from the order denying their said motion. There is no appeal from the judgment.

The defendants contend that the relief granted to the plaintiff was too broad, the judgment restraining the commission of acts which, it is said, should not, upon the facts as alleged and found, have been enjoined. This question cannot be raised on the record before us. "Upon an appeal from an order granting or denying a new trial, only such matters can be considered as are made grounds upon which the superior court is authorized to grant or deny the motion." (*Green v. Duvergey*, 146 Cal. 379, [80 Pac. 234].) Upon such appeal the appellate court cannot consider either the sufficiency of the complaint or of the findings to support the judgment. (*Martin v. Matfield*, 49 Cal. 42; *Brison v. Brison*, 90 Cal. 323, [27 Pac. 186]; *Bode v. Lee*, 102 Cal. 583, [36 Pac. 936]; *Riverside Water Co. v. Gage*, 108 Cal. 240, [41 Pac. 299]; *Rauer v. Fay*, 128 Cal. 523, [61 Pac. 90]; *Hunter v. Milam*, 133 Cal. 601, [65 Pac. 1079]; *Williams v. Long*, 139 Cal. 186, [72 Pac. 911]; *Williams v. Hawley*, 144 Cal. 97, [77 Pac. 762]; *Brownlee v. Reiner*, 147 Cal. 641, [82 Pac. 324].)

The record before us does, however, properly present the question whether the evidence is sufficient to justify the findings, and in our opinion this is the only question which need be considered.

The complaint alleges, in substance, that on October 5, 1904, a representative of the defendant union informed plaintiff, a corporation engaged in the business of manufacturing and selling mattresses and bedding, that six men, members of the said union, must quit plaintiff's employ, and that if plaintiff would not discharge all its non-union mattress-makers the said union would call out on a strike the six union members and would declare a boycott against the plaintiff's business.

The plaintiff declined to comply with this demand. Thereupon the defendant union inaugurated and declared a boycott upon plaintiff's business, and called out the six men, who quit the employ of plaintiff, although said six men had informed plaintiff that they were willing to re-enter plaintiff's employ, but feared violence at the hands of members of the union if they did so. It is alleged that the defendants "entered into a combination, confederation and conspiracy for the purpose of coercing the plaintiff and subjecting the control of plaintiff's business" to said union by inaugurating and declaring a boycott on plaintiff's business, and in pursuance of said combination, confederation, and conspiracy placed pickets in the vicinity of plaintiff's place of business, and that said pickets intercepted, molested, intimidated, and frightened the non-union employees of plaintiff by threats of violence and prevented them from remaining in the employ of plaintiff. In furtherance of the said conspiracy the defendants sent plaintiff's various customers a notice informing them that a boycott had been placed on plaintiff by the defendant union and requesting them to withdraw their patronage from plaintiff. A notice stating that plaintiff was so boycotted was similarly posted in many public places. It is averred that the pickets were so placed for the purpose of not only intimidating the plaintiff's employees into quitting its service, but for the purpose of intimidating customers of plaintiff. Plaintiff alleges on information and belief that many persons have been frightened and intimidated from plaintiff's said place of business by the pickets and by said notices and posters above mentioned. It is alleged that the pickets threaten to continue the acts complained of; that plaintiff has already been damaged in the sum of one thousand dollars; and if said acts continue as threatened plaintiff will suffer irreparable injury; that there is no plain, speedy, or adequate remedy at law, and that each of the defendants is financially irresponsible.

The defendants filed an answer denying some of the allegations of the complaint and making certain affirmative averments. Upon the trial, the court found that "all the allegations contained in the plaintiff's complaint are true and that all the allegations contained in the answer of the defendants are untrue." The bill of exceptions contains specifica-

tions questioning the sufficiency of the evidence to justify the finding in favor of each of the foregoing allegations of the complaint. As to some of these, no issue is raised by the answer. The defendants did, however, make direct and positive denials that any representatives or pickets of the defendants "interfered or molested or intimidated or frightened non-union employees of plaintiff or any thereof, or any person"; that "any threats of violence or of doing violence to the person have ever been made by any person whatever on behalf of these defendants or any thereof to any of the employees of plaintiff or to any one else for any purpose whatever; that any of the defendants have ever placed any pickets in the neighborhood of plaintiff's place of business for the purpose of intimidating patrons or customers of plaintiff or that any customer of plaintiff has ever been intimidated or frightened from patronizing the plaintiff by anything done or said by defendants or any one acting upon their behalf or any picket of said defendant union." It is denied that pickets or representatives of defendant union "were at the time of the filing of the complaint herein or are now engaged in any of the acts complained of."

It cannot be questioned that these denials raise material issues. The essence of plaintiff's complaint is the unlawful interference by defendants with the conduct of its business. Such interference is alleged to have been exercised in two ways: by posting or sending out notices, and by stationing pickets about plaintiff's place of business. Of these two methods, the latter was probably the more objectionable, as more likely to have a coercive or intimidating effect. It is alleged that the pickets were intended to, and did in fact, threaten and intimidate prospective customers of plaintiff, and that they sought to frighten workmen from the employ of plaintiff by threats of physical violence. The record is entirely devoid of evidence tending to show that the pickets had come in contact with, or had in any manner whatever influenced any one who may have desired to deal with plaintiff as a customer. It may be questioned whether there is any competent evidence tending to show, on the part of the pickets, any acts or words amounting to a threat, express or implied, of bodily violence as against the plaintiff's employees. But if we assume that what was shown in this regard would justify

the inference that the conduct of the pickets conveyed such threat to the workmen of plaintiff, it was not made to appear that any pickets were stationed at or near plaintiff's place of business at any time after the twelfth day of October. The complaint was filed on October 19th. There was no testimony, therefore, to justify the finding that the pickets "are still engaged in the acts . . . complained of." The findings here under discussion form the basis of much of the relief awarded by the decree, and the fact that no support for them is to be found in the evidence requires the reversal of the order appealed from.

In justice to counsel for respondent it should be stated that the meagerness of the evidence offered in support of the complaint was not due to any neglect upon his part. While he was examining a witness, and before he had given any indication of a readiness to close his case, the court interrupted and asked what the defense in the case was. This information having been given, the defendants were directed to put in their defense at once. This colloquy then ensued:—

Mr. Hutton (attorney for defendants).—"Do you close your case, Mr. Finnell?"

Mr. Finnell (attorney for plaintiff).—"If his honor thinks it is sufficient."

The Court.—"Put your defense in."

The defendants thereupon moved for a nonsuit, which was denied, and then rested their case without offering any evidence. Apparently the plaintiff was prepared to offer further evidence, but very naturally hesitated to insist upon his right to present it in the face of the court's intimation that a complete case had been made out. It is unfortunate for the respondent that it may have been thus prevented from fully proving its right to the relief sought. The fact remains, however, that it was the right of the defendants to insist upon proof of every material allegation of the complaint which had been controverted by the answer. The record failing to show such proof, the cause must be remanded for a new trial.

The order appealed from is reversed.

Angellotti, J., Shaw, J., Henshaw, J., McFarland, J., Lorigan, J., and Beatty, C. J., concurred.

[S. F. No. 4568. In Bank.—April 28, 1908.]

MARY J. RYAN, Appellant, v. NORTH ALASKA SALMON
COMPANY, Respondent.

NEGLECTANCE CAUSING DEATH—LAW OF FOREIGN STATE—TRANSITORY ACTION.—A cause of action to recover for a death occasioned by negligence, created by the statutes of another state, or of the United States, is transitory in its nature, and may be enforced in this state, but only for the purpose and upon the terms permitted by the *lex loci*.

ID.—ACTION IN THIS STATE—FOREIGN LAW MUST BE PLEADED AND PROVED.—As at common law there was no right of action for an injury causing death, and as the courts of this state do not take judicial notice of the laws of foreign states, it is necessary for the plaintiff, in an action in this state to recover for an injury causing death in a foreign state, to allege and prove the law of such foreign state giving a right of action for the death.

ID.—RIGHT OF PLAINTIFF TO SUE.—In such an action, the law of the foreign state must be pleaded not only to show that in that forum there existed the right of action sued upon, but also to show that the action is brought by the person in whom, under the laws of the foreign jurisdiction, the right of action is vested.

ID.—LAWS OF FOREIGN STATE CONTAINED IN BRIEFS.—The presentation of the laws of the foreign state in the briefs of counsel cannot on appeal be considered the equivalent of a presentation of them in evidence.

ID.—DISMISSAL OF ACTION—REFUSING LEAVE TO AMEND—HARMLESS IRREGULARITY.—The ordering such action dismissed without leave to amend, upon sustaining a demurrer to the complaint for want of sufficient facts to constitute a cause of action, although technically erroneous, will not warrant a reversal on appeal, when it is apparent that the plaintiff, under the law of the foreign state, could not amend so as to state a cause of action. In such case the irregularity is without injury.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Frank Schilling, for Appellant.

C. H. Wilson, for Respondent.

McFARLAND, J.—The complaint charged that Orion F. Ryan met his death in the territory of Alaska through the negligence of the defendant company by which he was employed. Plaintiff sues to recover damages for the death so occasioned, not as the personal representative, but as his mother and sole surviving heir. (Code Civ. Proc., sec. 377.) The complaint is silent as to the laws of the territory of Alaska, and defendant's general demurrer for lack of facts was sustained by the court without leave to amend, and the action was accordingly dismissed.

The demurrer was properly sustained. Where the action, as here, is transitory in its nature, a right or liability imposed by the statute of another state, or of the United States, may in proper cases be asserted and enforced in this state. Such may be taken to be the settled rule since the case of *Dennick v. Railway*, 103 U. S. 11. But the courts of this state will only entertain such an action for the purpose and upon the terms permitted by the *lex loci*. In other words, the right to prosecute this action in California is permissible only if permissible under the laws of Alaska, and only upon such terms as the laws of Alaska prescribe. And, as at common law there was no right of action for an injury causing death, and as the courts of this state do not take judicial notice of the laws of foreign states, it is necessary for the plaintiff to plead and prove such law. Thus it is said in *Wickersham v. Johnston*, 104 Cal. 407, [43 Am. St. Rep. 118, 38 Pac. 89], quoting from *Liverpool Co. v. Phenix Ins. Co.*, 129 U. S. 445, [9 Sup. Ct. 469]: "The law of Great Britain since the Declaration of Independence is the law of a foreign country, and, like any other foreign law, is matter of fact, which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved." "There being no right of action at common law for an injury causing death, the plaintiff in such an action must specifically aver and prove that the laws of the state where the injury occurred permit such an action." (8 Am. & Eng. Ency. of Law, p. 880; 13 Cyc. 345.)

But it is equally well settled that not only must the law of the foreign state be pleaded to show that in that forum there existed the right of action sued upon, but also it must be pleaded to show that the action is brought by the person in

whom, under the laws of the foreign jurisdiction, the right of action is vested, and this because, as is said in *Dennick v. Railway*, 103 U. S. 11, where this subject is considered, the court which renders the judgment can only do so by virtue of the foreign statute. Generally that power is given to the personal representative of the deceased. The laws of this state are broader in this respect, and confer the same right upon the heirs or next of kin of the deceased. But the right conferred by our statute can be exercised only where the cause of action has arisen within the jurisdiction of this state, and not in cases such as this, where the measure of the right and the form of procedure are those dictated by a foreign statute. It would follow, therefore, that if the right to prosecute an action such as this is limited by the laws of the territory of Alaska to the personal representative of the deceased alone, such personal representative only could prosecute the action in this state. In the briefs of counsel for respondent the laws of the territory of Alaska are set forth and it is made to appear that it is the personal representative only who may maintain such an action, and the existence of this law is urged upon this court as a reason in justification of the trial court's ruling dismissing the action. But neither the trial court nor this court takes judicial notice of those laws, and the presentation of them in the brief of counsel cannot be considered the equivalent of a presentation of them by pleading or in evidence. So far then, as this court can judicially know, it may be that the laws of the territory of Alaska will permit the prosecution of an action in the form here adopted and countenanced by the code of this state. In this view, it may be said that technically the trial court fell into error in ordering the action dismissed. But, upon the other hand, plaintiff did not ask leave to amend—probably for the reason that, in the situation of the law, she could not successfully amend. And upon this appeal her counsel does not contend that, by any amendment, he could have obviated the difficulty. The most that can be said, then, as to appellant's rights, is that the irregularity was one without injury, and that an appellate court will in every such case sustain the action of the court below, whatever course it may take, unless it is made to appear by the record that there has been an abuse of discretion. whereby injury has resulted. (*Stewart v. Douglass*, 148 Cal. 512, 83 Pac. 699.)

The judgment appealed from is, therefore, affirmed.

Henshaw, J., Shaw, J., Angellotti, J., Lorigan, J., and Sloss, J., concurred.

[S. F. No. 4843. In Bank.—April 28, 1908.]

CLYDE S. PAYNE, Appellant, v. HARRY BAEHR, Respondent.

PUBLIC OFFICER—REFUSAL TO PERFORM OFFICIAL DUTY—LIABILITY FOR SPECIAL INJURY—MANDAMUS.—A public officer is liable to respond in damages to one specially injured by his neglect or refusal to perform an official ministerial duty to the extent of such special injury, and under the statutes of this state (Pol. Code, sec. 4332; County Government Act, sec. 222) for every failure or refusal to perform official duty where the fees are tendered, the officer is liable on his official bond. This remedy to the injured party necessarily exists independently of the right of a party beneficially interested in the performance of an official duty to compel the performance of the same by the proceeding of *mandamus*.

ID.—GARNISHMENT OF MONEYS OWING BY MUNICIPALITY—DUTY OF AUDITOR TO JUDGMENT CREDITOR.—Under section 710 of the Code of Civil Procedure, enacted March 20, 1903, it is the official duty of the auditor of the city and county of San Francisco to draw his warrant, upon compliance with the conditions specified in such section, for the benefit of a judgment creditor of a person to whom the city and county owes money, and for the failure to perform such duty the auditor is liable in damages to such judgment creditor properly demanding the performance of such duty.

ID.—SALARY OF POLICE COURT STENOGRAPHER—PLEADING—PRESENTATION OF DEMAND.—In an action against such auditor to recover damages for his failure to draw a warrant against the amount due for salary to an official stenographer of the police court of said city and county, for the benefit of a judgment creditor of that official, a complaint which alleges that the stenographer had performed all conditions on his part to be performed "to entitle him to have his demand against the treasury audited by said auditor," sufficiently avers, as against a general demurrer, the presentation of a demand in proper form to be audited by the auditor.

ID.—FILING OF AUTHENTICATED TRANSCRIPT OF JUDGMENT—DAMAGES—EXEMPTION OF SALARY FROM EXECUTION.—In such an action, it is not necessary to allege in the complaint that the authenticated transcript of the judgment, required to be filed with the auditor under

section 710 of the Code of Civil Procedure, was filed subsequent to the auditing by him of the stenographer's demand for salary; nor in order to show damage to the plaintiff, was it necessary that the complaint should allege that the money owing to the stenographer from the city and county were in whole or in part not exempt from execution. Such exemption, if it existed, was a matter for the defendant to show on the issue of damages.

ID.—MONEY OWING BY MUNICIPALITY—ACCRUAL OF CLAIM.—Under that section, the judgment creditor can obtain only such money as "is owing to the judgment debtor" at the time of the filing of the authenticated transcript of judgment and affidavit, but money may be so "owing" although the demand therefor has not been audited. It is sufficient that the claim of the judgment debtor against the city and county has fully accrued at the time of the filing of the transcript, and when finally the demand is audited and ready for payment, the transcript of judgment previously filed is sufficient to cover the audited claim to the extent that it had accrued at the time of such filing.

ID.—APPROVAL OF JUDGMENT CREDITOR'S DEMAND—DEMAND ON AUDITOR FOR DAMAGES.—In such an action, it was not necessary for the demand of the judgment creditor of the stenographer to be approved by the police judges, nor was it essential to his cause of action against the auditor for damages that he should have made any demand on the auditor, other than the demand embraced in the filing of the authenticated transcript of judgment and affidavit provided for by section 710 of the Code of Civil Procedure.

PLEADING—AMENDMENT OF COMPLAINT.—Unless it be clear to a trial court that a defective complaint cannot be amended so as to obviate the objections made thereto, a plaintiff desiring it should be allowed reasonable opportunity to so amend.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

John Hubert Mee, for Appellant.

W. H. Cobb, and A. L. Weil, for Respondent.

ANGELLOTTI, J.—This is an appeal from a judgment dismissing the plaintiff's action upon sustaining defendant's demurrer to plaintiff's complaint. The action was one for the recovery of damages for the failure of defendant, as auditor of the city and county of San Francisco, to draw his warrants in favor of the justices' and superior courts of said

city and county for sufficient to pay certain judgments recovered in said courts by plaintiff against one Howard Vernon, a creditor of said county. The complaint was in two counts in substantially the same form, the first alleging a judgment of the justice's court given and made on October 9, 1901, for \$325.86, and the second alleging a judgment of the superior court given and made on June 22, 1904, for \$395.49, being apparently a judgment recovered on the justice's court judgment. The demurrer attacked each count, both for want of facts, and for uncertainty, ambiguity, and unintelligibility.

The action is based on the provisions of section 710, Code of Civil Procedure, enacted March 20, 1903 (Stats. 1903, p. 362), providing for the garnishment of moneys owing a judgment debtor from any county, city and county, city, or other municipal or public corporation. That section has been held constitutional by this court, and applicable to the salaries of public employees, at least to all except officers whose salaries are fixed by a provision of the constitution, and in a proceeding for a writ of mandate instituted by a salaried employee to compel the auditor of the city and county of San Francisco to audit and allow a demand in favor of petitioner for his salary, the writ was denied on the ground that such auditor had been served by a creditor of the petitioner with a certified copy of a judgment for ninety-eight dollars in his favor against the petitioner, accompanied by the affidavit prescribed by said section. It was held that it was the duty of the auditor, under this section, to deliver the demand, when audited, allowed, and indorsed, to the court rendering the judgment, or its authorized officer. (*Ruperich v. Baehr*, 142 Cal. 190, [75 Pac. 782].)

Section 710, Code of Civil Procedure, provides that when a duly authenticated transcript of a judgment, for money, against a defendant, rendered by any court in this state, accompanied by an affidavit stating the exact amount at the time due on such judgment and that the claimant desires to avail himself of the provisions of the section, is filed with the auditor of any county, city and county, etc., from which money "is owing to the judgment debtor in such action," "it shall be the duty of any such official . . . to draw his warrant in favor of or to pay into the court from the docket of which the transcript was taken," so much of the money owing to

the judgment debtor as shall be necessary under the judgment, so that the court may properly apply the same. The law thus prescribes an official duty, ministerial in nature, to be performed by the auditor for the benefit of the judgment creditor, when properly requested, somewhat analogous to the duty of a sheriff to whom a writ of attachment or execution is delivered with directions to levy the same. It cannot reasonably be claimed that he would not be liable to the creditor properly demanding the performance of such duty, for any actual damage caused such creditor by his refusal to perform the same. It is elementary that a public officer is liable to respond in damages to one specially injured by his neglect or refusal to perform an official ministerial duty to the extent of such special injury (See *Mock v. Santa Rosa*, 126 Cal. 330, 344, [58 Pac. 826]), and our statutes provide that for every failure or refusal to perform official duty where the fees are tendered, the officer is liable on his official bond. (Pol. Code, sec. 4332; County Government Act, sec. 222.) This remedy to the injured party necessarily exists independently of the right of a party beneficially interested in the performance of an official duty to compel the performance of the same by a resort to the proceeding of mandamus. We are of the opinion that, as against a general demurrer for want of facts, the complaint sufficiently stated a cause of action for damages specially caused plaintiff by the failure and refusal of defendant to perform a ministerial duty which he was called upon to perform for the benefit of plaintiff.

It is substantially alleged in the second count of the complaint that the defendant was at all the times named the auditor of the city and county of San Francisco; that ever since January 2, 1901, one Howard Vernon was a stenographer of the police court of said city and county under appointment by the judges thereof; that during the months of May, June, July, and August, 1903, said Vernon performed all duties pertaining to his said position, and "all conditions on his part to be performed to entitle him to have his demand against the treasury of said city and county" for two hundred dollars for each of said months "audited by said auditor"; that said auditor has "audited" each of said demands, but did not deliver and has not delivered any of said demands to said Vernon; that on June 22, 1904, in the superior court

of said city and county, a judgment was duly given and made, in favor of plaintiff and against said Vernon for \$395.49, which judgment remains wholly unpaid; that on September 1, 1904, a duly authenticated transcript of such judgment, accompanied by the affidavit prescribed by section 710, was filed with defendant as auditor; that during the month of August, 1904, said Vernon performed all the duties pertaining to his said position and "all conditions on his part to be performed to entitle him to have his demand against the treasury . . . for the sum of two hundred (\$200) dollars audited by said auditor," and that the auditor audited the same for said amount, "and after the filing of the authenticated transcript of judgment and affidavit" hereinbefore referred to, delivered the demand so audited to said Vernon; that at the time said affidavit and said transcript of judgment were filed with the auditor "there was unpaid to said Howard Vernon by said city and county of San Francisco" the sum of one thousand dollars for services rendered by him as such stenographer for the months of May, June, July, and August, 1903, and August, 1904; that said defendant has refused and failed to comply with the demand of plaintiff and to draw his warrant in favor of said superior court for so much of said money as would satisfy said judgment; and that "by reason of the premises plaintiff was damaged in the sum of" \$400.79, the amount due on said judgment. These allegations sufficiently make a *prima facie* case as against the general demurrer.

In regard to the objection that it was not alleged that the demands of Vernon had been approved in writing by the police judges, it was alleged that Vernon had performed all conditions on his part to be performed "to entitle him to have his demand against the treasury . . . audited by said auditor," which sufficiently implied, as against the general demurrer, the presentation of a demand in proper form to be audited by the auditor.

The objection that it does not appear in the complaint that the authenticated transcript was filed subsequent to the auditing by the auditor is immaterial. It is undoubtedly true that the judgment creditor can obtain under section 710, Code of Civil Procedure, only such money as "is owing to the judgment debtor" at the time of the filing of the authenti-

cated transcript of judgment and affidavit, but money may be so "owing" although the demand therefor has not been audited. It is sufficient for all the purposes of this section that the claim of the judgment debtor against the city and county has fully accrued at the time of the filing of the transcript, etc., and that nothing remains to be done to entitle him to the money except the presentation of a proper demand therefor, and the approval of the same by the auditor. The auditor is, of course, not required to do anything in the way of drawing his warrant until after audit, but when finally the demand is audited and ready for payment, the transcript of judgment previously filed is sufficient to cover the audited claim to the extent that it had accrued at the time of such filing. The delivery of the audited claim to the person entitled thereto may, and generally does, immediately follow the auditing, and a construction of section 710 which would require the transcript of judgment to be filed after audit and before delivery would practically nullify the remedy sought to be granted judgment creditors thereby.

The allegations sufficiently showed as against the general demurrer that there was one thousand dollars "owing to the judgment debtor" from the city and county at the time of the filing of the transcript of judgment and affidavit.

It was not necessary in order to show damage to plaintiff that the complaint should allege that the moneys owing to Vernon from the city and county were in whole or in part not exempt from execution. It was alleged in terms that plaintiff was damaged in the sum of \$400.79 by the failure of the auditor to perform the duty incumbent on him in the matter of plaintiff's claim, which sufficiently tendered an issue as to damage and the amount thereof. If the circumstances were such as to exempt all or any portion of this money from execution, so that plaintiff would not have been able to obtain the amount due him on the judgment from the money that would have come into the possession of the court if the auditor had done his duty, that was, at most, a matter for the defendant to show on the issue of damage.

We have now discussed all the objections urged by defendants under the general demurrer for want of facts, which are applicable to the second count. There is an additional objection applicable only to the first count. The judgment upon

which the claim set forth in that count was based was rendered in the year 1901, which was prior to the enactment of section 710, Code of Civil Procedure, and it is claimed that the section has no application to judgments rendered prior to its enactment. It is not necessary to consider this contention for the purposes of this appeal, for if the demurrer was improperly sustained as to the second count, the judgment must be reversed, and as the second count is apparently based on a later judgment obtained in an action given in 1901, the question may be immaterial in any further proceedings in this case.

The demurrer on the ground of uncertainty was not well taken in so far as the second count was concerned.

Conceding that it was necessary that the demand of Vernon against the city and county should have been approved by the police judges of the city and county before it could be audited by the auditor, it was not necessary that the demand of *plaintiff*, Payne, should be approved by said police judges, and a specification of uncertainty in this regard is immaterial.

It was not essential to a cause of action in favor of plaintiff against the auditor for damages that he should have made any demand on the auditor, other than the demand embraced in the filing of the authenticated transcript of judgment and affidavit provided for by section 710 of the Code of Civil Procedure, which affidavit in terms stated that the creditor desired to avail himself of the provisions of this section.

As we have seen, such a demand will cover moneys "owing" to the judgment debtor at the time of the filing, although the claim therefor has not as yet been audited.

It does clearly appear in the complaint that the demand of Vernon was audited prior to the commencement of the action. This disposes of all objections on the ground of uncertainty which were applicable to the second count. Specifications of ambiguity and unintelligibility were the same as those of uncertainty, and none of them was well taken.

It thus appears that the demurrer should have been overruled, at least so far as the second count is concerned. It is, therefore, unnecessary to consider the contention of appellant that even if the demurrer was good, the trial court erred in sustaining it *without leave to plaintiff to amend*. It is proper, however, to state that unless it be clear to a trial court that

a defective complaint cannot be amended so as to obviate the objections made thereto, a plaintiff desiring it should be allowed reasonable opportunity to so amend. (See *Schaake v. Eagle etc. Can. Co.*, 135 Cal. 480, [63 Pac. 1025, 67 Pac. 759].)

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Shaw, J., Sloss, J., Lorigan, J., and Henshaw, J., concurred.

[S. F. No. 4716. Department One.—April 29, 1908.]

GEORGE W. SCHELL, Appellant, v. A. W. GAMBLE et al.,
Respondents.

FRAUDULENT CONVEYANCE—FUTURE CREDITORS—DEED OF GIFT.—A deed of gift may be void because made with intent to enable the grantor to defraud future creditors, but to be so, it must be fraudulent in its inception, made with the specific intent to defraud future creditors.

ID.—FRAUDULENT INTENT QUESTION OF FACT.—The question of such fraudulent intent as to future creditors is one of fact and not of law, and the burden of proof is upon the complaining creditor to show that the conveyance was made with such intent.

ID.—CONFLICT OF EVIDENCE.—Where the evidence is conflicting as to whether a deed of gift was executed in fraud of future creditors, a finding upholding the deed will not be disturbed.

APPEAL from an order of the Superior Court of Contra Costa County refusing a new trial. William S. Wells, Judge.

The facts are stated in the opinion of the court.

D. W. Burchard, and R. H. Latimer, for Appellant.

M. A. Jones, for Respondents.

ANGELLOTTI, J.—This is an appeal from an order denying plaintiff's motion for a new trial. The action was instituted September 15, 1902, by a judgment creditor of defendant A. W. Gamble, to subject certain real property in Santa Cruz and Contra Costa counties, standing of record in the

name of defendant W. H. Gamble, son of defendant A. W. Gamble, to execution upon the judgment of plaintiff, upon the ground as to the Santa Cruz property, that a conveyance thereof by the father to the son, made July 20, 1893, was made with intent to defraud certain designated creditors and is void, and upon the ground as to the Contra Costa property, that the same is in fact the property of A. W. Gamble, purchased by him in November, 1898, and that the legal title thereto was at the time of the purchase caused by said A. W. Gamble to be placed in his son, with the intent and for the purpose of defrauding said creditors.

The principal contention of appellant is that the findings of the trial court in favor of defendants upon these matters are not sufficiently supported by the evidence. This contention cannot be upheld.

First, as to the Santa Cruz property: The conveyance of this property was made by A. W. Gamble to his son on July 20, 1893, although the deed was not recorded until July, 1894. At the time of the execution of the conveyance, no one of the designated creditors was a creditor of A. W. Gamble, and the record does not show that he then had any creditor at all. The designated creditors were one Lasserot, J. H. Skirm, and W. D. Storey, attorneys at law, and plaintiff. Lasserot's claim was founded in tort, and none of the acts upon which the claim is based was committed until December 1, 1893. Mr. Skirm's claim was for fifty dollars for legal services, rendered in the year 1894, he having been retained in December, 1893. Mr. Storey's claim was also for legal services, he having been first retained in July, 1894. Plaintiff's claim was for legal services rendered under employment of date March 2, 1898. The record does not show that, at the time of the execution and delivery of the conveyance, there was any probability that any of these parties would ever be a creditor of A. W. Gamble. It is true that a deed of gift, which we may assume this deed to have been, may be void because made with intent to enable the grantor to defraud future creditors. (See *Bush & Mallett Co. v. Helbing*, 134 Cal. 676, [66 Pac. 967], and authorities there cited.) But to bring a case within this rule the deed must be fraudulent in its inception, made with the specific intent to defraud future creditors. The question of such fraudulent intent as to such future creditors is one of

fact and not of law (Civ. Code, sec. 3442), and the burden of proof is upon the complaining creditor to show that the conveyance was made with such intent. (*Bush & Mallett Co. v. Helbing*, 34 Cal. 676, [66 Pac. 967].) We have carefully examined the evidence contained in the record, and find no warrant for holding that there is not therein substantial evidence to support the conclusion of the trial court in this matter so far as the conveyance of the Santa Cruz land on July 20, 1893, is concerned. The most that appellant can establish in this regard is that there was a substantial conflict of evidence, and, under the well-settled rule, the decision of the trial court is conclusive.

Second, as to the Contra Costa property: The evidence was ample to sustain the conclusion of the trial court that A. W. Gamble never owned any interest whatever in this property. It was acquired by W. H. Gamble from one Bishop in the year 1898, apparently in exchange for certain property of Mrs. A. W. Gamble, who was the wife of A. W. Gamble and the mother of W. H. Gamble, and the assumption by the grantee of certain existing mortgages on the property. No part of the consideration therefor came from A. W. Gamble. It is claimed that the real property given by Mrs. Gamble in exchange for this property had been fraudulently conveyed to her by W. H. Gamble. She acquired this property in the year 1893 by deed from her husband, and there was substantial evidence to the effect that it was so conveyed to her in payment of a just debt due her from him, and without any intent on his part to defraud anybody.

Other findings attacked are not material in view of our conclusion upon those already discussed.

Several alleged errors of law on the part of the trial court in the matter of the admission and rejection of testimony were assigned in the statement on motion for new trial, but they are noticed in appellant's brief only by a general statement that all of them were valid and well taken. We have, however, examined them, and find nothing therein of sufficient importance to warrant a reversal, even if any of them was technically erroneous.

The order denying a new trial is affirmed.

Shaw, J., and Sloss, J., concurred.

[S. F. No. 4674. Department One.—April 29, 1908.]

**FRANK COREA, Respondent, v. BERNARDO HIGUERA
et al., Appellants.**

WAY OF NECESSITY—ELEMENTS ESSENTIAL TO EXISTENCE OF RIGHT.—

A right of way of necessity does not exist except in cases of strict necessity. That a way over the grantee's land is too steep, or too narrow, or that other and like difficulties exist, does not alter the case, and it is only when there is no way through his own land that a grantee can claim a right over that of his grantor. It must also appear that the grantee has no other way.

ID.—RIGHT OF WAY PASSES WITH LAND.—A right of way which is appurtenant to land passes with the transfer of the land.

ID.—PLEADING—FINDINGS—EXISTENCE AND OWNERSHIP OF RIGHT OF WAY.—An allegation in a complaint to establish the plaintiff's title to a designated right of way, to the effect that he is the owner of such right of way over the defendants' land, and that such easement is appurtenant to his land, is a sufficient averment of the ultimate fact of the existence of the right of way and of his ownership, and findings in accordance therewith are sufficient to support a judgment in favor of the plaintiff declaring him to be the owner of the right of way, and enjoining its obstruction.

ID.—APPEAL FROM JUDGMENT—FINDINGS OF ULTIMATE AND PROBATIVE FACTS.—Upon an appeal on the judgment-roll alone, a judgment based upon allegations and findings of sufficient ultimate facts cannot be successfully assailed merely because the complaint and the findings contain in addition a showing of probative facts which, taken alone, might not support the judgment.

ID.—ULTIMATE WHEN CONTROLLED BY PROBATIVE FACTS.—Findings of probative facts can be used to overcome an express finding of the ultimate fact only where the probative facts found are inconsistent with the ultimate fact found, or where it appears that the trial court made the alleged finding of ultimate fact simply as a conclusion from the particular facts found.

PLEADINGS—COMPLAINT—STATUTE OF LIMITATIONS.—A demurrer to a complaint, on the ground that the plaintiff's cause of action is barred by the statute of limitations is not good unless the complaint affirmatively shows that the statutory period has run since the accrual of the cause of action.

ID.—DATE OF OBSTRUCTION OF WAY.—In an action to establish the plaintiff's title to a right of way and to enjoin its obstruction by the defendant, a demurrer to the complaint on the ground that the cause of action is barred by the statute of limitations should not be sustained, where the complaint fails to show when the defendants first obstructed the road or interfered with plaintiff's use of it.

Id.—EXTINGUISHMENT OF RIGHT OF WAY.—If plaintiff's right of way was extinguished by disuse, and such extinguishment did not appear on the face of the complaint, the fact, if it existed, was matter of defense to be set up in the answer and proved by the defendant.

APPEAL from a judgment of the Superior Court of Santa Clara County. A. L. Rhodes, Judge.

The facts are stated in the opinion of the court.

Charles Clark, for Appellants.

W. H. Johnson, for Respondent.

SLOSS, J.—The complaint in this action alleges that on November 2, 1894, the defendant Bernardo Higuera was the owner of lot 7 of the Higuera Rancho. On that day the defendants conveyed a portion of said lot to John Freitas, one of the boundaries of the tract conveyed being described as the center of the Higuera Ranch road, a road connecting with the county road. Thereafter Freitas died, and in 1897 the executors of his will, pursuant to a probate sale duly authorized and confirmed by the superior court, conveyed the land so acquired by their testator to the plaintiff, who has ever since been the owner and in possession thereof. At all the times mentioned there had been a road, leading from the land conveyed to Freitas, across the remaining portion of lot 7, to the Higuera Ranch road. The road which thus traversed lot 7 was used by defendants prior to their conveyance to Freitas, and at the time of the latter's purchase, was open, laid out, and used, as a means of ingress and egress to and from the land conveyed, "and was the only road so laid out and open by which said place could be reached by team; and . . . the said road was and had been appurtenant to said lands." The defendants claim to be the exclusive owners of said road and have obstructed it. It is alleged that plaintiff is the owner of and entitled to said right of way.

A demurrer to the complaint having been overruled, the defendants answered, denying the allegations of the complaint regarding the existence of the road in question; denying that said alleged road was open, laid out, or used, at the time of Freitas' purchase, or that of plaintiff, or that it was the only

road by which said place could be reached by team. The answer denies, further, that the road was or is appurtenant to the land of plaintiff, or that plaintiff is the owner of any right of way over defendants' lands. By way of affirmative defense it is alleged that the land conveyed to Freitas and subsequently to plaintiff was at all times bounded on one side by the main Higuera Ranch road, by which the plaintiff and his predecessors had access to and from his lands to the county roads. There is a further averment that any use which plaintiff or Freitas may have made of the road over defendants' lands was solely by the permission of the defendants.

The court finds that at the times of the conveyances to Freitas and to plaintiff, there had been and was, leading from the land so conveyed, across the remaining portion of lot 7, a road used by the defendants prior to their conveyance, with the lands conveyed to Freitas. This road is found to have been open, laid out, and used, as a means of ingress or egress to said lands, and was the only road so laid out and open by which said lands could be reached by team. Said road was, at the time of Freitas's purchase, appurtenant to said lands and passed with the same. It was appurtenant to said lands at the time plaintiff purchased, and passed to him as appurtenant thereto. There is a finding that plaintiff "is the owner of and entitled to said right of way over the lands of defendants to the county road, to pass and repass on foot and with team." The court further finds that the lands of plaintiff are bounded on one side by the Higuera Ranch road, which was and is an open traveled road leading to the county road. Said Higuera Ranch road was not, prior to the commencement of this action, used by plaintiff, and plaintiff "has not easy access to said Higuera Ranch road, for any purpose to and from his own lands or at all." It is found "that plaintiff is entitled to the said right of way, as appurtenant, over the lands of defendants," and there is a finding against the allegation of the answer that the use of said way by plaintiff and his predecessors was by the permission of defendants.

Upon these findings the court entered a judgment declaring the plaintiff to be the owner of the roadway described in the complaint and enjoining the defendants from obstructing said road or interfering with plaintiff's use thereof.

The defendants appeal from the judgment. The evidence is not before us, the appeal being taken on the judgment-roll alone.

The principal point urged is that neither the complaint nor the findings state a case entitling the plaintiff to relief. Assuming that the plaintiff claims a "way of necessity," the appellants argue that the facts alleged and found do not authorize the assertion of such right. This conclusion is undoubtedly sound. The complaint shows—as do the findings—that the land conveyed to plaintiff's predecessor was at all times bounded on one side by the Higuera Ranch road, which connected with the county roads. This circumstance alone is fatal to the existence of a way of necessity. The facts that there was no constructed track for teams, connecting plaintiff's land with the Higuera Ranch road, as may be inferred from the complaint, or that, as the court finds, plaintiff had not "easy access" to that road, would not entitle him to assert a right of way by necessity. "The right of way from necessity must be in fact what the term naturally imports, and cannot exist except in cases of strict necessity. . . . That the way over his land is too steep, or too narrow, or that other and like difficulties exist, does not alter the case, and it is only when there is no way through his own land that a grantee can claim a right over that of his grantor. It must also appear that the grantee has no other way." (*Krupp v. Curtiss*, 71 Cal. 62, [11 Pac. 879].)

But, as is pointed out by respondent, his right does not rest upon the claim of a way of necessity. The complaint alleges, and the court finds, that the right of way here in dispute was, at the time of the conveyance to Freitas, appurtenant to the land conveyed. It is also alleged and found that the plaintiff is the owner of said right of way, which is specifically described. If the right of way was appurtenant to the land, it passed with the transfer of that land. (Civ. Code, sec. 1104.) What is an appurtenance is defined by section 662 of the Civil Code. The findings that the plaintiff was the owner of the way in question and that it did constitute such appurtenance are findings of fact and such findings, in the absence of a claim that they are not supported by the evidence, necessarily lead to the conclusion that plaintiff was entitled to judgment. An easement is real property, and an allegation that

plaintiff is the owner of specific real property, has always, in this state, been regarded as an averment of an ultimate fact, not of a conclusion of law. (*Payne v. Treadwell*, 16 Cal. 220; *Haight v. Green*, 19 Cal. 117; *Garwood v. Hastings*, 38 Cal. 218; *Johnson v. Vance*, 86 Cal. 130, [24 Pac. 863]; *Haggin v. Kelly*, 136 Cal. 483, [69 Pac. 140].) An averment that a certain road or street is a public highway is a statement of a fact (*Bequette v. Patterson*, 104 Cal. 282, [37 Pac. 917]; *People v. McCue*, 150 Cal. 195, [88 Pac. 899], and we see no reason why an allegation that the plaintiff is the owner of a described right of way or other easement over defendant's land, and that such easement is appurtenant to plaintiff's land, should not be regarded as a sufficient statement of the ultimate facts to be established. Such allegations have been held to be sufficient in other jurisdictions (*Whaley v. Stevens*, 27 S. C. 549, [4 S. E. 145]; *Hall v. Hedrick*, 125 Ind. 326, [25 N. E. 350]; and we are cited no authority in support of the contention that they set forth merely conclusions of law.

The appellants argue, however, that the specific facts alleged and found are insufficient to show the existence of a right of way appurtenant to the land conveyed. But, if we assume this to be true, the appellants would not be helped. The facts stated regarding the use of the way prior to the conveyance to Freitas are merely probative facts, and if not inconsistent with the findings of ultimate facts, cannot affect those findings. This subject was fully considered by this court in *People v. McCue*, 150 Cal. 195, [88 Pac. 899]. Upon a careful review of the authorities, it was there declared that upon an appeal on the judgment-roll alone, a judgment based upon allegations and findings of sufficient ultimate facts cannot be successfully assailed merely because the complaint and the findings contain in addition a showing of probative facts which, taken alone, might not support the judgment. The findings of probative facts can be used to overcome an express finding of the ultimate fact only where the probative facts found are inconsistent with the ultimate fact found, or where it appears that the trial court made the alleged finding of ultimate fact simply as a conclusion from the particular facts found. These conditions do not exist here. The averments and findings regarding the use of the road prior to the conveyance to Freitas, if they are not sufficient to establish the existence of

a right of way as appurtenant, are in no way inconsistent with such right. Nor is there anything on the face of the findings to show that the court treated the finding that the right of way was appurtenant or the further finding that plaintiff was the owner of such way as mere conclusions following from other facts found. The findings of these ultimate facts are separate and independent.

Appellants urge that plaintiff's cause of action is barred by the statute of limitations, and that their demurrer, which specified this ground, should have been sustained. A demurrer on this ground is not good unless the complaint affirmatively shows that the statutory period has run since the accrual of the cause of action (*Wise v. Hogan*, 77 Cal. 184, [19 Pac. 278]; *Williams v. Bergin*, 116 Cal. 56, [47 Pac. 877]). The complaint here does not show when the defendants first obstructed the road or interfered with plaintiff's use of it. If, as is suggested by appellants, plaintiff's right was extinguished by disuse (Civ. Code, sec. 811) such extinguishment did not appear on the face of the complaint, and, if it existed, was matter of defense to be averred and proved by the defendants.

There are no other points requiring notice.

The judgment is affirmed.

Angellotti, J., and Shaw, J., concurred.

[S. F. No. 4563. Department One.—April 29, 1908.]

MARSHALL W. GROOM, Appellant, v. FRED. BANGS,
Respondent.

ACTION FOR DEATH OF WIFE—MALPRACTICE OF PHYSICIAN—PLEADING—HEIRSHIP OF HUSBAND.—In an action by a husband to recover damages for the death of his wife, alleged to have been caused by the negligent malpractice of the defendant as her physician, the complaint need not expressly aver that the husband is the heir of his deceased wife, where it is alleged that she was his wife at the time of her death.

U.—CERTAINTY OF CAUSE OF ACTION.—The cause of action is not uncertain. It is neither for injury to the wife nor to the husband in her lifetime; but is one cause of action only for damages to the

husband as heir of the wife, for a negligent injury causing her death.

Id.—AMENDED AND SUPPLEMENTAL COMPLAINT—NEW CAUSE OF ACTION—DISCONTINUANCE—DEMURRER WITHOUT OBJECTIONS—APPEARANCE—WAIVER OF IRREGULARITY.—Where the original complaint was by husband and wife for damages for bodily pain and injury caused by the alleged negligent and unskillful treatment of her by the defendant; and an amended and supplemental complaint stated a new cause of action by the husband alone for the negligent and unskillful treatment of the defendant causing her death, the filing of the same, was, in effect, a discontinuance of the former action, and the beginning of a new action for a new cause. Where the defendant, without objection, appeared to the new cause of action, and demurred to the new pleading, the irregularity in the mode of the procedure was waived; and objection thereto cannot be urged upon appeal for the first time.

Id.—SURVIVORSHIP OF ORIGINAL CAUSE OF ACTION—IMMATERIAL QUESTION.—The question whether or not the original cause of action survived to the husband on the death of the wife is immaterial. The original complaint was not before the court, and the sufficiency of the amended complaint upon demurrer, as to the right of the plaintiff to maintain the cause of action therein stated, is to be determined solely by its own allegations without reference to those in the original complaint.

APPEAL from a judgment of the Superior Court of Santa Clara County. A. L. Rhodes, Judge.

The facts are stated in the opinion of the court.

William P. Veuve, and L. B. Archer, for Appellant.

Samuel G. Tompkins, for Respondent.

SHAW, J.—This is an appeal from a judgment after an order sustaining a demurrer to the complaint.

The complaint demurred to purports to state a cause of action in favor of Marshall W. Groom to recover damages alleged to have been sustained by him from the death of Hattie L. Groom, his wife. It alleges that she was, at all the times mentioned, his wife, that the defendant, a licensed physician, was employed by plaintiff to treat her, that she was thereupon placed under his care and that he was negligent, careless, ignorant, and unskillful, that in consequence of his ignorant, unskillful, negligent, and careless treat-

ment of her, the particulars whereof are set forth at length, she died, and that by reason of said negligent and wrongful acts resulting in her death the plaintiff has suffered damage in the amount of twenty-five thousand dollars. We cannot discern wherein the complaint lacks in the averments essential to a good cause of action by the husband, as an heir of the wife, for damages accruing by reason of her death occasioned by the wrongful act or neglect of another, a right of action expressly given by section 377 of the Code of Civil Procedure. It was not necessary to expressly allege that he was her heir. It is alleged that she was his wife at the time of her death, and as surviving husband, he would, under any ordinary circumstances, be her heir. (*Knott v. McGilvray*, 124 Cal. 129, [56 Pac. 789].) The respondent points out no particular wherein it is defective as a cause of action of that character.

One ground of demurrer was that the complaint was uncertain because it could not be ascertained therefrom whether the action was for damages to the wife during her lifetime, or for damages to the husband resulting from injuries to the wife. Another ground was that there was a misjoinder of actions, in that it stated a cause of action for each of the above-mentioned injuries. The only damage alleged is that to the husband resulting from the death of the wife. It could not be upheld as an action for damages caused either to the husband or wife during her lifetime. There is no such uncertainty, and but one cause of action is stated, namely, an action for damages to the husband as an heir of the wife, for a negligent injury causing her death.

The complaint we are here considering is designated an amended and supplemental complaint and was filed by leave of court. The original complaint, also appearing in the record, was filed before the death of the wife. In that complaint the husband and wife were both joined as plaintiffs and it stated a cause of action for damages to the wife from bodily pain and injury suffered by her caused by the alleged negligent and unskillful treatment of her by the defendant. The briefs discuss at length the question whether or not an action of that character survived to the husband upon the death of the wife. We deem the question immaterial. The original complaint is not before the court. The sufficiency of the amended complaint, upon demurrer, as to the point

of the right of the plaintiff to maintain the action, is to be determined solely by its own allegations, without reference to those of the original complaint. In the new complaint neither Hattie L. Groom, nor any one representing her interest, is joined as plaintiff. The husband is the sole plaintiff therein, he sues in his own right and he states a cause of action for an injury to himself alone arising from the death of the wife, an injury and cause of action which did not exist in her lifetime and which accrued only upon her death. It is a cause of action entirely different from that sued on in the original complaint. The filing of the amended and supplemental complaint was, in effect, a discontinuance of the previous action and the beginning of a new action for a new cause. This method of procedure was irregular, but no objection was made upon that ground. On the contrary, the defendant appeared to this new action and demurred to the new complaint, thus waiving process thereon. The proper practice, if the defendant did not wish to consent to the mode of proceeding, was to move to strike the new complaint from the files on the ground that it was not an amended or supplemental complaint, but stated a new and different cause of action. No such motion was made. The demurrer does not raise the point. It is a case in which the court had jurisdiction of the subject-matter and of the parties and where no objection was properly made in the court below to the manner of procedure by which the cause was brought before that court. In such cases the objection cannot be made for the first time on appeal. (*Santa Barbara v. Eldred*, 95 Cal. 381, [30 Pac. 562]; *Power v. Fairbanks*, 146 Cal. 613, [80 Pac. 1075]; *Hart v. Carnall-Hopkins Co.*, 101 Cal. 163, [35 Pac. 633]; *De Jarnatt v. Marquez*, 132 Cal. 702, [64 Pac. 1090].)

The judgment is reversed.

Angellotti, J., and Sloss, J., concurred.

[L. A. Nos. 1973, 1993. Department Two.—April 29, 1908.]

H. S. PATTEN et al., Respondents and Appellants, v. PEPPER HOTEL COMPANY, Appellants; GERMAN SAVINGS AND LOAN SOCIETY, Cross-Complainant, Respondent, and BARR REALTY COMPANY, ABBIE E. BARR et al., Co-Defendants.

FORECLOSURE OF MORTGAGE BY SECOND PLEDGEEES—FIRST PLEDGEE MADE DEFENDANT — CROSS-COMPLAINT — OBJECTION TO PARTIES BY VENDEE OF MORTGAGOR.—The second pledgee of a note and mortgage, though not the holder thereof, has such an interest therein as entitles him to foreclose the same, where the first pledgee who is the holder thereof is made a party to the action. The grantee of the mortgagor is not entitled to object that the first pledgee is made a party defendant and not joined as co-plaintiff. But such objection is obviated where the first pledgee files a cross-complaint to foreclose the mortgage, thus virtually uniting in the foreclosure.

ID.—EXERCISE OF OPTION BY HOLDER TO DECLARE PRINCIPAL SUM DUE—RIGHT OF SECOND PLEDGEE TO FORECLOSE—INUREMENT OF BENEFIT.—Where the first pledgee as holder of the note and mortgage, has exercised an option given in the mortgage to declare the principal sum due for non-payment of interest, the exercise thereof inures to the benefit of the second pledgee of the note and mortgage as plaintiff, and an allegation made in the complaint that such option has been exercised by the first pledgee, as holder, entitles the plaintiff to claim such option by suing to foreclose the mortgage.

ID.—TIME OF ELECTION BY HOLDER OF NOTE—PLEADING—ADMISSIONS—FINDING UNNECESSARY.—Where both the complaint of the plaintiff, and the cross-complaint of defendant bank as holder, each avers that because of default in the payment of the interest on the mortgage note they had both elected to exercise the option provided for therein, and had declared the whole of said note due and payable, and such averments are admitted by failure to deny them specifically, no finding was required to be made upon the matter so admitted.

ID.—TENDER OF INTEREST SUBSEQUENT TO EXERCISE OF OPTION.—Tender of interest subsequent to the exercise of the option could not affect such exercise, or raise any issue thereon.

ID.—CONSIDERATION OF NOTE AND MORTGAGE—ATTACK BY VENDEE OF MORTGAGOR.—Where the maker of the note and mortgage was not a party to the action to foreclose the mortgage against his grantee, who as part of the purchase price assumed payment of the indebtedness to the pledgees, such grantee cannot as against them assail the note and mortgage for want of original consideration.

ID.—ATTORNEY'S FEES ON FORECLOSURE—DISCRETION.—The amount to be allowed as attorney's fees on the foreclosure of a mortgage, rests peculiarly in the discretion of the court.

ID.—BASIS OF AWARD OF FEES.—The extent of the responsibility which an attorney assumes by reason of the amount involved in the foreclosure proceedings which he is conducting, and his actual services therein are to be considered, for the purpose of fixing the compensation.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial.

The facts are stated in the opinion of the court.

Percy B. Lloyd, for Plaintiffs, Respondents and Appellants.

E. C. Bower, and Enoch Pepper, for Pepper Hotel Company, Appellant.

W. B. Mathews, for German-American Savings Bank, Respondent.

LORIGAN, J.—This action was brought by the plaintiffs as second assignees and pledgees of a note and mortgage to foreclose said mortgage.

The complaint alleged that on August 25, 1903, Coonrod Smith (not a party to the action) executed to the defendant Abbie E. Barr a promissory note for sixty thousand dollars payable five years after its date and to secure its payment also executed a mortgage in her favor on the property described in the complaint. The note set forth in the complaint provided for the payment of interest quarterly and contained an option in favor of the holder of the same to declare the whole principal and interest due in case of default in payment of the interest. It is then alleged that subsequent to the execution of said note and mortgage, said defendant Abbie E. Barr made two assignments thereof, in pledge however, one to secure the payment of an indebtedness then owing by the defendant Barr Realty Company to the defendant German-American Savings Bank on the promissory note of said company in the sum of thirty-five thousand dollars, the other

assignment being in pledge to secure an indebtedness due to the plaintiffs from the said Barr Realty Company in the sum of \$38,340.60 evidenced by a promissory note of said realty company; that said second assignment to plaintiffs was subject to the pledge of said note and mortgage in favor of the defendant bank; that default in the payment of the interest due on said promissory note of said Smith had been made and because thereof the German-American Savings Bank, as the owner and holder of the same had elected to exercise the option in said note contained and declared the whole of said note, principal and interest, due and payable; that because of said default, the plaintiffs also had elected to declare the whole of said note executed by Smith due and payable. It is then alleged that the defendant Pepper Hotel Company, by mesne conveyances since the execution of said mortgage by Smith, had become and was the owner of the real estate covered by said mortgage. The prayer was for a foreclosure and sale of the mortgaged premises; and that the proceeds of said sale be applied first to the payment of the note of the Barr Realty Company to the defendant bank, and second, for the application of the balance of the proceeds to the payment of the promissory note executed by said Realty Company in favor of plaintiffs.

The defendant Pepper Hotel Company demurred to the complaint, challenging the sufficiency of the facts stated to warrant relief and asserted as a further ground that there was a defect and misjoinder of parties plaintiff and defendant. The demurrer was overruled, and thereafter an answer and cross-complaint was filed by the defendant German-American Savings Bank. The answer admitted all the allegations of the complaint. The cross-complaint set up substantially the same facts that were contained in the complaint relative to the assignment and pledge of said Smith note to the bank by the defendant Abbie E. Barr to secure payment of the note of the Barr Realty Company; that default in the payment of interest on both notes had been made; that it had elected to exercise the option provided for in the Smith note and had declared the whole of said note, principal and interest, due and payable, and concluded with a prayer similar to that in the complaint for the foreclosure of the mortgage and application of the proceeds.

The Pepper Hotel Company, by its answer, as a defense to the claim of both the plaintiffs and the cross-complainant German-American Savings Bank, averred that the note and mortgage from Smith to the defendant Abbie E. Barr were without consideration and that the plaintiffs and the said bank took their assignments thereof with notice of that fact. By way of a relief against a foreclosure of said mortgage it was averred that the Pepper Hotel Company was willing and able and intended to pay the interest which fell due on the Smith note on July 12, 1905 (and for default in the payment of which the option was exercised), but that circumstances over which it had no control prevented it from so doing until about the 20th of July, 1905; that on said date said hotel company offered to pay the cross-complainant bank all accrued interest on said note and that on the 25th of July, 1905, a similar offer was made by the defendant. It was then averred that if a foreclosure be ordered it will entail great financial sacrifice on said hotel company to meet the judgment; that if said note were permitted to run to maturity according to its terms, said hotel company would meet the payments thereof without such great loss; that the said mortgaged premises were ample security for said debt, were worth the sum of ninety thousand dollars, and that cross-complainant is in no danger of loss because of insufficient value of said property. The prayer is that the note and mortgage be declared void for want of consideration, or that if held to be valid, and a valid lien against the property of the hotel company that said company be relieved from the penalty of having the principal of said note declared due and payable; that said defendant cross-complainant bank be required to accept said interest and that the action be dismissed.

The German-American Savings Bank and the Pepper Hotel Company were the only defendants who answered, the others making default.

The findings of the court were in favor of the plaintiffs and the cross-complainant bank, and a judgment decreeing a foreclosure and sale and application of the proceeds as prayed for by them was ordered entered thereon. The Pepper Hotel Company appeals from said judgment and also from an order denying its motion for a new trial.

The plaintiffs also appeal from that portion of the judgment which allows them but six hundred dollars as attorney's fees.

Both appeals will be disposed of herein.

As to the main appeal by the Pepper Hotel Company. Several grounds are urged by it for a reversal of both the judgment and the order, but there are only a few which we think merit consideration.

It is insisted on the appeal from the judgment that the court erred in overruling the demurrer of appellant to the complaint. Its position in that respect is, first, that plaintiffs had no right to bring the action because not being the holders of the note they could not exercise the option to declare the principal due as it is provided in the note that such option must be exercised by the holder thereof, and that the German-American Savings Bank, and not the plaintiffs, had the actual control and exercised dominion over said note and mortgage as a pledge; second, that plaintiffs and the German-American Savings Bank being united in interest, there was a nonjoinder of parties plaintiff in not making the bank a plaintiff, and a misjoinder of parties defendant in making the bank a defendant without alleging that the bank refused to join as a plaintiff. In support of the second point, > appellant cites section 382 of the Code of Civil Procedure. While it is true that the plaintiffs did not actually hold the note and mortgage of Smith, they being held by the defendant bank as the first assignee and pledgee thereof, it is not questioned but that the plaintiffs had such an interest in said note and mortgage as would entitle them to maintain an action for foreclosure, but it is insisted that the complaint does not disclose a present right to do so, nor did the plaintiffs attempt to enforce such right by proper pleadings, and hence the demurrer should have been sustained upon all the grounds urged. We cannot agree with this view. From the allegations in the complaint itself, it appears that there is nothing in the point made by appellant that the plaintiffs not being the holders of the note could not exercise the option to declare it due. It is alleged therein, not only that the plaintiffs had exercised the option, but that the bank, the actual holder of the note when the action was commenced, had also done so. If it be conceded that the plaintiffs, not being the holders,

could not exercise the option, still no question can be made but that the bank could do so, and that its action in that respect would inure to the benefit of plaintiffs.

As to the other point urged, of defect and misjoinder of parties. There are, at least, two sufficient reasons why the point is untenable. It will be observed that the bank as first assignee of the note and mortgage and the mortgagee Abbie E. Barr were both made parties to the action as defendants. All those, therefore, who were interested in enforcing the lien of the mortgage were before the court either as parties plaintiff or defendant. This was all that the appellant, as successor in interest to the mortgagor, could insist on. It was immaterial to the appellant, as such successor, whether the bank as first assignee of the note and mortgage, was a party plaintiff or defendant. If the bank did not object, it did not lie with appellant as successor of the mortgagor to raise the question. The same point urged here was before the court of appeals of New York in *Simpson v. Satterlee*, 64 N. Y. 657, where the decision of the supreme court in the same case (6 Hun, 305) was affirmed. That action was to foreclose a mortgage for four thousand dollars from the defendants Satterlee to the plaintiff's testator and assigned by said testator to the defendant Martling to secure payment of one thousand dollars. The complaint alleged the assignment, that the debt for which the mortgage had been pledged had been unpaid, and prayed that from the proceeds of the sale the amount thereof should first be satisfied. The defendants Satterlee—the mortgagors—demurred to the complaint on the ground, among others, that the defendant Martling should have been made a plaintiff instead of a defendant. The demurrer was overruled, and on appeal it was held by both courts that while in such actions the pledgee is a necessary party, still as far as the mortgagor, or other parties in interest are concerned, it is immaterial whether he be made a party plaintiff or defendant; that so long as the assignee was a party and did not object to his position under the pleadings, the mortgagor could not raise the question. (See, also, *Burlingame v. Parce*, 12 Hun, 149.) There is no difference between the case at bar and the cases referred to so far as the principle announced in the latter is concerned.

Aside from this, however, and as an additional reason why the point urged is untenable, it appears that after the demurrer was overruled, the defendant German-American Savings Bank filed a cross-complaint in which it alleged practically the same facts as were contained in plaintiffs' complaint, among others, a default in the payment of the interest on the sixty thousand dollar note and that it had elected to exercise the option contained therein of declaring the whole amount due and sought a foreclosure of the mortgage. So that in effect it joined with the plaintiffs in the action to foreclose, and hence, if there was any merit in appellant's point as to a defect or misjoinder of parties, it was subsequently obviated by the filing of the cross-complaint in which the bank became a plaintiff in the case. A judgment will not be reversed for a ruling on demurrer for nonjoinder or misjoinder of parties when it appears from subsequent pleadings that for all intents and purposes of the action, the defect complained of has been supplied or removed.

Now as to the appeal from the order denying the motion of appellant for a new trial. It is insisted, first, that the court erred in refusing to allow appellant to offer evidence with a view of showing that the Smith note and mortgage were made wholly without consideration.

As heretofore stated, Smith, the maker of the note and mortgage was not a party to the action; nothing whatever was sought against him. The attack upon the note and mortgage was sought to be made by the appellant as successor in interest of Smith to the mortgaged premises. Under the conceded facts in the case, however, appellant had no right to make such attack. It appears from the evidence that appellant purchased the property mortgaged from the Barr Realty Company, the successor in interest of Smith, long after the execution of the note and mortgage by him, and that as a part of the purchase price thereof, appellant assumed the payment of an indebtedness of one hundred and two thousand dollars; that this consisted of several amounts contained in a certain schedule introduced in evidence. From the schedule it appeared that among other items of indebtedness represented by this one hundred and two thousand dollars so assumed and to be paid by appellant, were the sums due to the bank and the plaintiffs on the notes of the Barr Realty Company

to secure the payments of which the assignments of the sixty-thousand-dollar note and mortgage were made by the defendant Abbie E. Barr. It further appeared by the terms of an instrument executed between the appellant and the said bank, having reference to the said two notes to secure which the assignment of the Smith note and mortgage had been made by the defendant, that it was expressly agreed by the appellant that the mortgage should be a lien on the real property described therein as security for the payment of said sixty-thousand-dollar note. Under these conceded facts the appellant had no right to attack the note and mortgage of Smith for want of consideration. It assumed the payment and discharge of them as part of the purchase price. If, under the circumstances, the attack which the appellant was attempting to make, were permitted, it would be in effect to hold that, notwithstanding, appellant as purchaser retained sixty thousand dollars of the purchase price of the land under an express agreement to pay it to plaintiffs and the bank in discharge of a note and mortgage on the purchased premises, still it might show that there was no consideration for said note and mortgage, and thus defeat the loan and retain the money. This would be clearly inequitable and the law does not permit it to be done. The rule is that failure or want of consideration as between the parties to a mortgage cannot be set up as a defense by a purchaser of the lands subject to the mortgage which is in fact part of the consideration, whether he has expressly assumed the mortgage as a part of the purchase money or not. (Jones on Mortgages, 6th ed., sec. 1491; *Pratt v. Nixon*, 91 Ala. 192, [8 South. 751]; *Freeman v. Auld*, 44 N. Y. 50; *Price v. Pollock*, 47 Ind. 362.)

The next point raised is as to one of the findings of the court upon the exercise of the option contained in the note. The court found that the interest on the sixty-thousand-dollar note, which was due on July 12, 1905, had not been paid, and that "on account of such failure to pay said interest, said defendant and cross-complainant German-American Savings Bank and said plaintiffs thereupon elected to declare and did declare the whole of the principal of said \$60,000 note and the interest thereon due and payable."

The appellant claims that the portion of the finding which we have quoted was not sustained by the evidence; that the

uncontradicted evidence shows that when appellant offered to pay the bank the interest on the sixty-thousand-dollar note on July 28, 1905, (the bank having agreed that the appellant might have until the twelfth day of July, 1905, to pay it,) the option which it was provided might be exercised on default of payment of interest had not in fact been exercised. But we do not think under the pleadings that this point is available to appellant. The complaint of plaintiffs and the cross-complaint of the defendant bank alleged that because of default in the payment of interest on said sixty-thousand-dollar note, they had both elected to exercise the option provided for therein and had declared the whole of said note, principal, and interest due and payable. These allegations were not denied by the appellant, either in its answer to the complaint or cross-complaint, so that neither evidence in their support nor finding upon them was necessary. As we understand the briefs of appellant it is not claimed that there was any specific denial of these allegations as to the exercise of the option. Its position is that taking the allegations of the complaint and the cross-complaint in connection with the averments in the answer of the tender of interest to the bank at the dates therein alleged, an issue was raised as to the right of plaintiffs and the cross-complainant bank to exercise the option and was equivalent to a denial of its exercise prior to the tender. But this position of appellant can only be sustained upon the theory that the allegations in the complaint and the cross-complaint as to the exercise of the option maturing the indebtedness must be construed to mean that at the time of and by the filing the complaint and cross-complaint only (on September 5 and October 5, 1905 respectively) the plaintiffs and the cross-complainant bank elected to exercise the option; that these allegations do not amount to a statement that the option had been exercised prior to that date. But the allegations in the complaint and cross-complaint are not subject to that construction. In *Fletcher v. Dennison*, 101 Cal. 292, [35 Pac. 868], an action to foreclose a mortgage, it was alleged "that on the failure of the defendants to pay the installments of interest which by the terms of said promissory note and said indebtedness became and was due on the 21st day of October, 1902, the plaintiffs elected to declare and did declare the said principal

and the interest thereon due and payable." The action was brought some thirty-nine days after default in payment of interest and when the option might have been exercised. A general demurrer to the complaint was interposed and overruled. On appeal from the judgment by the defendants it was urged that the option to declare the whole note due under the allegations of the complaint was not exercised until the filing of that pleading and as the complaint was not filed until thirty-nine days after the right to exercise the option had accrued, the plaintiff had waited an unreasonable time and hence had waived his right to exercise the option. It was held by this court that the allegation of the complaint which we have quoted "as against a demurrer was a sufficient averment of election at the time the interest became due." The allegations in the complaint and cross-complaint as to the exercise of the option are in no respect materially different from the allegation construed in the case cited. Here plaintiffs alleged that because of default in the payment of interest, plaintiffs and the cross-complainant bank have elected to exercise the option and have declared all the indebtedness due, and under the authority of the case cited this was a sufficient averment of the exercise of the option at the time the interest became due and when default was made in its payment. As this was the effect of the allegations it was incumbent upon the appellant in order to raise an issue as to the exercise of such option to deny the allegations as broadly, at least, as they were made. This, it is clear, it did not do. While it is true that a tender of interest by appellant prior to the exercise of the option provided for in the note in question would, if properly pleaded, have defeated any right of the plaintiffs or cross-complainant to subsequently elect for that default to exercise such option (*Trinity County Bank v. Haas*, 151 Cal. 553, [91 Pac. 385]), still the answer here as framed does not present that defense; it does not aver that the tender of interest was made prior to the exercise of the option. The allegations being, as we have seen, a sufficient averment of the election to exercise the option at the time default was made in the payment of the interest, it is clear that the answer makes no denial of such alleged election at that time, nor do the averments of tenders of interest, which appellant contends amounts to a denial of the right to ex-

ercise such option, have that effect. The averments in the answer are that the appellant tendered the interest on the 20th of July, 1905, and again on the 25th of that month—eight and thirteen days respectively after the interest fell due and when the right to exercise the option accrued. Such averments clearly raise no issue upon the allegation of the exercise of the option as made by the complaint. In fact they show that these tenders were subsequent to the exercise of the option, which under the allegations of the complaint must be taken to have been exercised as of the date when default in the payment of interest occurred. It was incumbent on the appellant, if it desired to interpose as a defense the tender of interest prior to the option as alleged in the complaint and cross-complaint, to have averred that such tenders were made prior to the alleged exercise of such option. No such averment was made and hence no issue upon the subject was raised by the pleading. There was no necessity of introducing evidence upon an allegation which was not denied, as it was clearly unnecessary for the court to have found upon it.

We now approach the last point made by the appellant, which we think merits consideration.

It insists that the exercise of the option provided for in the note imposed terms upon the appellant in the nature of a penalty or forfeiture which should not be enforced by a court of equity and from the effect of which under the evidence in the case the trial court should have relieved it.

As to this contention it may be said in passing that it is quite apparent from the averments of the answer relating to the tender of the interest by appellant and other averments setting forth matters in excuse of its non-payment, when due, that these averments were made in support of its prayer for relief from the option alleged in the complaint and cross-complaint to have been exercised and were not intended to raise an issue as to whether the exercise of the option was in fact made as alleged, which latter point we have just had under consideration. However, as to the right of appellant to be relieved from what it denominates the penalty or forfeiture imposed under the option provided for in the note it insists that it should have been accorded such relief under the general principles of equity and under section 3275 of the Civil Code which provides that "Whenever, by the terms

of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty." Now, if it be conceded that the option provided for in the note was such a penalty or forfeiture, from the effect of which the appellant might be relieved, still before it could be entitled to relief it was essential to support by proof the averments in its answer under which it sought to bring itself within the provisions of the section. In this regard it alleged that the defendant bank had in February, 1905, expressed to appellant its intention of being indulgent in the matter of the payment of the note and mortgage, which expressions lulled appellant into a sense of security; and that by reason of circumstances over which it had no control it was prevented from paying the interest due July 12, 1905, until it made the tender thereof on July 20th and again on July 25th of that year. The court, however, found that no tender of interest was made by the appellant until July 28, 1905. It was found against the other averments of the answer as to the alleged expression of a desire by the bank to be indulgent to appellant and against the appellant upon its claim that it was prevented from making the payment of the interest by circumstances which it could not control. Hence, it will be observed that as to all the averments upon which appellant bases its application for relief the court found against it and the evidence sustains the findings. Under these circumstances appellant was entitled to no relief. It showed no justification or excuse at all for its omission to make payment when due.

These are the only points which we deem necessary to discuss on the appeal of the defendant Pepper Hotel Company. We have examined the other points which are made and are satisfied that they are without merit.

As to the appeal of the plaintiffs from that portion of the judgment allowing them attorney's fees to the extent of six hundred dollars only. No evidence was introduced as to what would be a reasonable attorney's fee. That matter was left to the determination of the court with the above result. It is claimed that it was an abuse of discretion on the part of the court not to have made a larger allowance. We do not per-

ceive in the record anything which discloses any abuse of discretion, and before we would be warranted in interfering with the award, that must affirmatively appear. The amount which will be allowed as attorney's fees on the foreclosure of a mortgage rests peculiarly in the discretion of the trial court. That court is familiar with the pleadings and proceedings on the trial and it is in the best position to determine what is, in the light of the facts, a reasonable amount of compensation to be paid for attorney's fees. From the record before us it appears that the pleadings were simple and that the actual trial of the issues in the case could have taken but a short time. It is true, as stated by appellant, that a large amount of money was involved and that this should be taken into consideration in determining the amount of compensation. So it should, and doubtless was, but the compensation to be awarded is not to be determined by a percentage calculation on the amount of the mortgage debt. It is the extent of the responsibility which an attorney assumes by reason of the amount involved in foreclosure proceedings which he is conducting that is to be taken into consideration, together with his actual services in the foreclosure proceedings, for the purpose of fixing his compensation. These matters were all taken into consideration by the trial court and it cannot be said on the record before us that the allowance as made was unreasonably low, or that there was any abuse of discretion in fixing it at the amount which the court did.

The judgment and order appealed from by the Pepper Hotel Company are affirmed, as is also that portion of the judgment appealed from by the plaintiffs.

Henshaw, J., and McFarland, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank, and filed the following opinion on June 12, 1908:—

BEATTY, C. J.—Having dissented from the order of the court denying a rehearing of this cause, I desire very briefly to state the grounds of my dissent. The case of *Fletcher v. Dennison*, 101 Cal. 292, [35 Pac. 868], does not, in my opinion,

support the construction given to the allegations of the complaint and cross-complaint in this action, as to the date of the election to treat the whole amount of the mortgage debt as due for default in the payment of interest. The allegation in respect to this matter in the case cited, is quoted in the opinion of the court. The allegations of the complaint and cross-complaint in this action are simply (in the first) that, "these plaintiffs have elected to exercise the option in said note contained, and have declared and hereby do declare the whole of the principal of said sixty-thousand-dollar note . . . due and payable"; and (in the second) "That default has been made in the payment of interest on said sixty-thousand-dollar note, and because thereof this cross-complaint has, as the owner and holder of said note last mentioned, elected to exercise," etc. These allegations, according to their grammatical and logical construction, mean nothing more than that the option of the respective assignees of the mortgage was exercised at the time of filing their several complaints, and by that means. So construed, it was impossible to deny them, and the hotel company did all that it could do, and all that was necessary to raise the material issue, by alleging a tender on the 25th of July, which was more than a month before the commencement of the action. The evidence very clearly shows that the tender was made as early as the 28th of July, and prior to any notice of an election to treat the whole debt as due. This was a complete defense to the action. (*Trinity Co. Bank v. Haas*, 151 Cal. 553, [91 Pac. 385].)

I think also that if section 3275 of the Civil Code applies to cases of this character, the offer to pay at the time it was made should have been held to relieve the penalty or forfeiture of the credit. The court found the neglect to pay the interest on the day it was due, to have resulted from carelessness and forgetfulness, but it did not find that the negligence was gross, and if not it would not uphold the forfeiture or justify the imposition of the penalty.

[L. A. No. 1963. In Bank.—April 29, 1908.]

EMIL KAISER, Appellant, v. U. M. BARRON, Respondent.

ACTION TO QUIET TITLE—RIGHT OF POSSESSION UNDER CONTRACT—UNSUPPORTED FINDINGS.—In an action to quiet title to twenty-five acres of land, where defendant pleaded a right of possession of the whole thereof under a contract, and proved only a right of possession of 13.08 acres, a finding that he was entitled to the possession of the residue, is without support; and a new trial must be ordered.

ID.—COST-BILL—IMPROPER COSTS—MOTION TO RETAX—EXECUTION WRONGFULLY ISSUED—INVOLUNTARY PAYMENT.—Where, pending a motion to retax costs improperly included in the cost-bill, an execution was wrongfully issued and the improper costs collected thereunder, the payment of such costs was not a voluntary payment, though there was no seizure of property of the defendant making the payment; and the entry of the costs in the judgment, and execution thereof being without authority, the court erred in refusing to recall the execution and in refusing to tax the costs.

APPEAL from a judgment of the Superior Court of Orange County and from orders after judgment refusing to recall an execution and to retax costs. J. W. Taggart, Judge.

The facts are stated in the opinion of the court.

F. C. Spencer, for Appellant.

Charles S. McKelvey, for Respondent.

HENSHAW, J.—Plaintiff sued to quiet title to a certain twenty-five acres of land. Defendant answered, setting forth a contract entered into by himself and plaintiff's predecessor in interest, the substance of which contract was that defendant would plant the northern fifteen acres in walnut trees, and would nurture and care for them until the first day of January, 1906, at which time, defendant having fulfilled the conditions of his contract, plaintiff's predecessor in interest agreed to convey to him the southerly ten acres. Defendant then averred that Sisson, plaintiff's predecessor in interest, placed him in the actual possession of the twenty-five acres of land for the purpose of fulfilling the covenants contained in the

agreement, and that ever since he has been in such possession under the provisions of their contract.

After trial, judgment passed for defendant, the judgment being to the effect that the contract above referred to was valid and subsisting, and that defendant was entitled to possession of the premises and was entitled, upon complying with the provisions thereof, to have a conveyance made to him of the southerly ten acres. From this judgment plaintiff appeals upon the judgment-roll. He also appeals from certain orders made after judgment, and which will hereinafter be more particularly specified.

Upon appeal from the judgment the contention is that the findings do not support it. The judgment, as has been said, decrees a rightful possession of the premises in defendant. Defendant pleaded, as above noted, that Sisson placed him in possession of all of the land for the purposes of fulfilling the contract, and that such possession, under such license and in accordance with the contract, he has ever since maintained. The findings, however, do not speak upon the matter, and while it may be said that it can be gathered from a reading of the contract that defendant, for the purposes of executing it, was entitled to the possession of the northerly fifteen acres which he was to set out as an orchard and irrigate, cultivate, and prune, yet the contract is wholly silent as to the possession or right of possession of the southerly ten acres. Defendant's right of possession of this comes, as he pleads, from the act of Sisson. But the court's failure to find upon this important matter leaves the judgment as to this ten acres without any support in the findings. The same may be said of another piece of the northerly fifteen acres, amounting to 1.92 acres. As to this, the finding of the court is that by executed parol agreement this portion of the fifteen acres was excluded, or, in other words, defendant was called upon to put into orchard only 13.08 acres. Nothing in the findings justified the court's judgment awarding a continued possession to defendant of this 1.92 acres. It stands in this regard precisely as does the ten acres above considered.

Defendant filed his cost-bill and plaintiff gave timely notice to tax the costs. The matter of taxing costs was continued by order of court, and, while so pending and undetermined, the judgment for costs was entered and docketed by the clerk and

execution thereon issued. Plaintiff then made his motion to recall the execution, upon the ground that it was improvidently issued, and also to tax the costs, and in so doing to disallow an item of \$3.75 for serving a subpoena, and an item of twenty dollars for reporter's charges, and to correct an error of \$9.95 in the addition of the items as they appeared upon the face of the bill. In response to this the defendant showed that after the execution levy for the costs upon the land, plaintiff, desiring to make a sale of his interest therein, paid the amount called for. Upon this showing the court ruled that the costs had been voluntarily paid, and denied these motions. But it is well settled that a payment of money made on execution is not a voluntary payment, even though there has been no seizure of the property of the one who makes the payment. (*First Nat. Bank v. Watkins*, 21 Mich. 483; *Knox Co. Bank v. Doty*, 9 Ohio St. 506, [75 Am. Dec. 479]; *Scholey v. Halsey*, 72 N. Y. 578; *Hiller v. Hiller*, 35 Ohio St. 645; *Manning v. Poling*, 114 Iowa, 20, [83 N. W. 895, 86 N. W. 30].) The only judgment for costs which the clerk has authority to enter is for costs which have been taxed. The entry of costs in the judgment, while a motion to tax them was pending, was without authority, and the issuance of an execution for the collection of such costs and the levy upon plaintiff's property was improvident and untimely. The motion to recall the execution should have been granted, as well as the motion to tax costs.

The order refusing to tax costs and the order refusing to recall the execution are reversed. The judgment appealed from is reversed and the cause remanded for a new trial. This renders unnecessary a consideration of the appeal from the order refusing to modify the judgment.

Angellotti, J., Sloss, J., Lorigan, J., and Shaw, J., concurred.

[S. F. No. 4213. In Bank.—April 29, 1908.]

W. W. YOUNG, Appellant, v. T. Z. BLAKEMAN, Respondent.

BOUNDARY LINE OF CITY LOTS—UNCERTAIN POSITION—AGREED LINE CONFIRMED BY OCCUPATION—TRUE LINE IN LAW.—When adjoining owners of city lots, being uncertain of the true position of the boundary line between them, agree upon its true location, mark it upon the ground, build up to it, and occupy on each side of it for more than thirty years, under such circumstances that substantial loss would be caused by a change of its position, such line becomes, in law, the true line called for by the respective descriptions of the lots, regardless of the accuracy of the agreed location, as it may appear by subsequent measurements.

ID.—OBJECT OF RULE—REPOSE AGAINST STRIFE—RULE BINDING UPON SUCCESSORS.—The object of the rule confirming occupation according to an agreed line, for a period up to or beyond the statute of limitations, is to secure repose against strife, and make titles permanent; and the rule not only binds the parties, but also their successors by subsequent deeds.

ID.—ORAL AGREEMENT FOR DIVISION LINE—STATUTE OF FRAUDS—DIVISION LINE ATTACHED TO DEEDS—TITLE TO EXCESS.—An oral agreement upon a division line, which is established by actual occupation of the parties for the requisite period is not within the statute of frauds. Title is not thereby transferred; but the division line, when established, attaches itself to the deeds of the respective parties, and simply defines the lands described in each deed, and if more land is given to one than the calls of his deed actually require, he holds the excess by the same tenure that he holds the main body of his lands.

ID.—LOTS OCCUPIED BY BUILDINGS FOR STATUTORY PERIOD—LEASE OF LARGE LOT WITH OPTION TO PURCHASE—PRESUMPTION—ESTOPPEL.—Where the adjoining lots were occupied by buildings for the statutory period, the grantee of the lot containing the excess is presumed to take up to the agreed line, and the grantor is estopped from withholding from the grantee possession up to the agreed line; and a subsequent conveyance from his heirs to the appellant for the excess carried no title, unless the purchaser is estopped from claiming the contrary.

ID.—EQUITABLE ESTOPPEL OF PURCHASER—PLEADING—EVIDENCE IN REPLY TO ANSWER.—Where the plaintiff relied upon an equitable estoppel of the purchaser to claim up to the agreed line, pleaded in the answer, he was entitled to offer evidence in reply to the answer without being called upon to plead such equitable estoppel.

1D.—EQUITABLE ESTOPPEL NOT PROVED—DEED UNDER OPTION ATTACHED TO AGREED BOUNDARY—SETTLEMENT WITH DIFFERENT POSSESSION.—Where the grantor of the option to purchase held by his building up to the agreed boundary the purchaser under the option took title up to that line, as attaching to his deed, without reference to its description; and a mere agreement by the holder of the option to sell a smaller strip on the other side of the lot to an adverse possessor thereof, against whom the grantor of the option laid no claim, the price of which was merely fixed as the estimated cost of a suit to quiet the title of the adverse possessor, did not prove an equitable estoppel of the purchaser, as grantee, to take title to the agreed lines, he not having been put by the grantor or his heirs to any election as to that matter. [Beatty, C. J., dissenting.]

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Olney & Olney, and Warren Olney, for Appellant.

T. Z. Blakeman, and Lindley & Eickhoff, for Respondent.

SIIAW, J.—This is an action to recover possession of land and involves the location of the boundaries between the respective lots of the plaintiff and defendant, situated in San Francisco. The plaintiff appeals from the judgment and from an order denying his motion for a new trial.

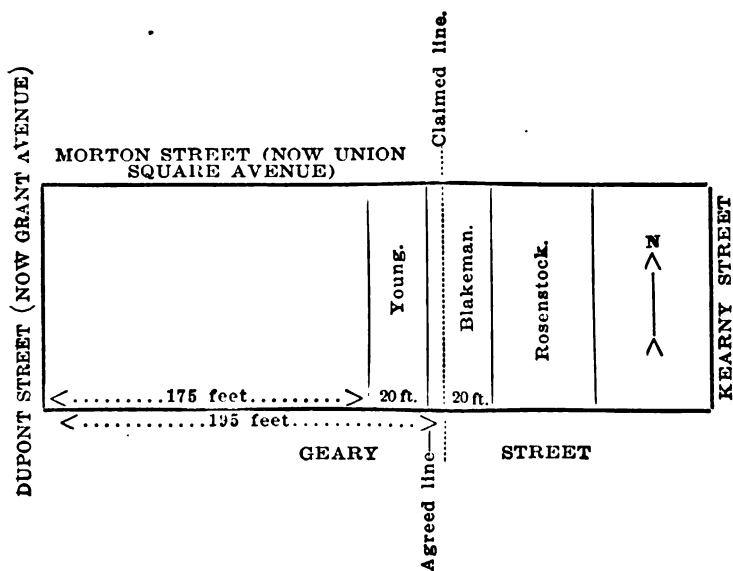
The two principal points urged by the plaintiff are, 1. That where adjoining owners have agreed upon and established a division line, a subsequent deed by one of them purporting to convey his tract by the original description, will not convey the title to the grantee up to the agreed line, if it turns out that the position of the line, according to the calls of the deed, newly measured, is within the bounds of his possession and includes less territory on his side than the agreed line; 2. That the defendant is estopped to claim the strip in controversy.

1. The action was begun in January, 1903. The defendant's predecessor, Miller, owned the lot which, according to his title-deeds, was bounded as follows: Beginning 195 feet easterly from the northeasterly corner of Geary and Dupont streets and running thence easterly, along the line of Geary

Street, twenty feet; thence northerly at right angles, parallel with Dupont Street, 122 feet and six inches, to Morton Street; thence at right angles westerly along the southerly line of Morton Street twenty feet; thence southerly at right angles 122 feet and six inches to the place of beginning. The plaintiff's predecessor owned a lot which his deeds described in the same manner, except that the point of beginning was situated 175 feet easterly from the northeasterly corner of Geary and Dupont streets. Each owned a lot fronting twenty feet on Geary Street and by their title-deeds the boundary between them was 195 feet westerly from the corner. More than thirty years before the action was begun they agreed upon the location of this division line and established it upon the ground. They and their respective successors have, ever since that time, acquiesced in the location and have erected buildings on their respective lots with walls on the line and have occupied the same for many years, without dispute until shortly before the action was begun.

The buildings on the defendant's lot were erected in 1874. In 1884 Miller, the owner, made a lease of the lot to one Apel, for a term of twenty years, at a fixed rental, inserting therein a clause giving Apel or his assigns an option to purchase the lot, at any time after fifteen years from the date of the agreement, at the price of forty thousand dollars. In pursuance of this lease and option Miller delivered possession of the lot and buildings to Apel. In 1894, Blakeman purchased the lease and option agreement and was given possession of the lot and buildings accordingly and has ever since held possession thereof up to the agreed line in question. During all this period Young and his predecessors under the original title-deeds have had possession of the lot to the west of the division line. After the expiration of the fifteen years Blakeman elected to exercise the option and buy the Miller lot at the price fixed. He made a tender, which was refused, brought suit for specific performance, obtained judgment and received from the heirs of Miller, who died before the suit was begun, a conveyance of the property. (See *Blakeman v. Miller*, 136 Cal. 138, [89 Am. St. Rep. 120, 68 Pac. 587].) In all the conveyances of all parties and their predecessors, and in the said lease, the respective lots were described by metes and bounds in the words above given, the

Blakeman lot being described as a lot beginning 195 feet west of Dupont Street and the Young lot as a lot beginning 175 feet west thereof, without mention of any monument at the division line, or of any agreement regarding the same. Dupont Street is now known as Grant Avenue. After the execution of the deed to Blakeman by the Miller heirs, they set up a claim to a strip of land on the west side of the lot $9\frac{3}{8}$ inches wide on Geary Street and $13\frac{3}{8}$ inches wide on Morton Street. This strip they quitclaimed to Young, who thereupon brought this suit for possession thereof. The subjoined plat, though not drawn exactly to scale, illustrates the position of the lots.



When the division line of adjoining owners is designated in their respective deeds as a line beginning at a specified distance from a fixed object, the only method of ascertaining the location of the line on the ground is by measuring the required distance from the object. Experience shows that such measurements, made at different times by different persons with different instruments, will usually vary somewhat. The position of the object or monument at which the course begins may also be changed and the change may not be known to the parties, or there may be no means of ascertaining its

original position. If the position of the line always remained to be ascertained by measurement alone, the result would be that it would not be a fixed boundary, but would be subject to change with every new measurement. Such uncertainty and instability in the title to land would be intolerable. For these and other reasons the rule has been established that when such owners, being uncertain of the true position of the boundary so described, agree upon its true location, mark it upon the ground, or build up to it, occupy on each side up to the place thus fixed and acquiesce in such location for a period equal to the statute of limitations, or under such circumstances that substantial loss would be caused by a change of its position, such line becomes, in law, the true line called for by the respective descriptions, regardless of the accuracy of the agreed location, as it may appear by subsequent measurements. The court found that the line in question had been thus located by the predecessors in interest of the parties, more than thirty years before the suit was begun. The evidence of the fact, though entirely circumstantial, is reasonably satisfactory.

It is conceded that such location is binding upon the parties who own the respective lots at the time the agreement is made, while their ownership continues. The plaintiff's theory is that the agreed line is good only between the original parties and suffices to mark the line called for by the description only with respect to the deeds under which they hold; that if one of these owners transfers his lot by a deed giving only the original description, delivering possession up to the agreed line, the vendee would not take title to the agreed line, but only to the area called for by the metes and bounds of the deed; that the subject is reopened for settlement between him and his grantor and if, upon a new measurement, it is found that part of the vendor's holding lies outside of the newly measured line and between that and the agreed line, the vendor will remain the owner thereof and may convey it to another, or recover the possession thereof from the vendee. His argument is that the vendor, in such a case, is the owner of the intervening strip by adverse possession against the adjoining owner, and not by his original title-deeds, and that a conveyance by the original description will not carry title to the land acquired by such adverse possession.

The object of the rule is to secure repose, to prevent strife and disputes concerning boundaries, and make titles permanent and stable. If it had no greater force than is thus contended for, it would be of little benefit and would fail to accomplish the purposes which led to its establishment. If the descriptions were not by metes and bounds, but designated the lots solely by their respective numbers or, as in the case of government lands, by sectional subdivisions, and there had been an agreement of this character between previous owners fixing the common boundary, it would scarcely be contended that the division line thus fixed is not binding on their respective grantees, or between a subsequent grantor and his grantee. The effect, however, is precisely the same in this case. The designation of the land by its number or sectional subdivision is nothing more than a reference to a previous survey which states the distance of the line from some fixed object and an adoption of that statement into the deed by the reference. It will still call for a measurement to ascertain the true position on the ground, unless it has been marked by a monument and in that case, if the monument is removed and other means of locating its position are not available, as often happens, a measurement must still be resorted to. If a measurement is made and the line agreed on and acquiesced in as required by this rule, it is binding on and applicable to all parties to the agreement and their successors by subsequent deeds. It is stated by the authorities that the line so agreed on becomes in legal effect the true line, that the agreement as to the line may be in parol and that it does not operate to convey title to the land which may lie between the agreed line and the true line, but that it fixes the line itself and the description carries title up to the agreed line, regardless of its accuracy; that the agreement as to the line is not in violation of the statute of frauds, because it does not transfer title; that the parties hold up to the agreed line by virtue of their original deeds and not by virtue of the parol agreement; that "the division line when thus established, attaches itself to the deeds of the respective parties, and simply defines, not adds to, the lands described in each deed," and that if more is thus given to one than the calls of his deed actually requires, he "holds the excess by the same tenure that he holds the main body of his lands."

(*Sneed v. Osborn*, 25 Cal. 630; *White v. Spreckels*, 75 Cal. 616, [17 Pac. 715]; 4 Am. & Eng. Ency. of Law, p. 861; 3 Wash. on Real Prop., sec. 2232; *Lewis v. Ogram*, 149 Cal. 509, [117 Am. St. Rep. 151, 87 Pac. 60], and cases there cited; *Kellogg v. Smith*, 7 Cush. 382; *Miles v. Barrows*, 122 Mass. 579.)

There is as much reason for the application of this rule to a grantor, so as to estop him from withholding from his grantee the possession up to the agreed line, or from asserting title to any part of the granted premises within the agreed line, as for applying it to the respective coterminous owners. Where land is occupied by buildings up to the agreed line, as in this case, the grantee is presumed to have bought the property with a view to the boundaries thus visibly marked and to have relied thereon and fixed the price according to the value of the property as thus defined and used. There is every reason that the grantor should be estopped to claim the contrary. In 1884, when Miller agreed to sell the property to Apel after fifteen years for forty thousand dollars, the buildings were on the land in the same position as when this suit was begun, and they served to mark the boundaries. It is to be presumed that it was the land thus built upon, used, and occupied, which Miller agreed to sell and Apel agreed to buy. It was this land and building that Miller delivered to Apel in pursuance of the agreement and of which Blakeman obtained possession in 1894, when he succeeded to Apel's right under that agreement. A boundary line thus fixed and marked has the same effect as a monument erected to mark a point in a survey; the distance does not control and the course runs to the monument, or to the agreed termination. A conveyance by the original description, executed after the line has been thus established, will be presumed to have been intended to refer to the distance as fixed by the agreement and marked by the occupancy in pursuance thereof, unless there is something in the deed or in the attending circumstances to rebut the presumption, which is not the case here.

It may be remarked that there is no evidence that any subsequent survey has been made by which the true line is located at the exact point claimed by the plaintiff. There is a reference to a recent survey in the testimony of the plaintiff,

but he does not give the results disclosed thereby. From the agreement between the heirs of Miller and Blakeman, to be hereinafter noticed, it may be inferred, by the aid of other evidence, that the true east line of the Blakeman lot is about seven inches east of the east line of his building. But this would not prove that the west line of his lot was an average distance of about eleven inches east of the west line of the building as claimed by plaintiff. The building is exactly twenty feet in width. There is a finding to the effect that a line 195 feet easterly from Grant Avenue would fall east of the agreed line the exact distance of the strip in dispute, *according to the location of Grant Avenue as "established at the time when this action was commenced."* No evidence appears corresponding to this finding. But conceding its truth, it does not follow that the line of Grant Avenue was at the same place as that occupied by Dupont Street in 1863 when the defendant's lot was first measured and located therefrom, or when the agreed line was established, or in 1884, when Apel received possession from Miller.

Our conclusion is that the effect of the deed to Blakeman by the heirs of Miller was to convey title to Blakeman, up to the agreed line on the west side of the lot, and that the subsequent deed from them to Young of the strip in controversy, carried no title, unless Blakeman is estopped to claim that strip by reason of the transaction now to be considered.

2. The main contention of the appellant is that the defendant is estopped to claim the strip in dispute. It is objected that the estoppel was not pleaded. Under our system of pleading no reply is allowed and if the plaintiff claims an estoppel against the defenses set up in the answer, he is entitled to give evidence concerning the same without plea. The rule that estoppels must be pleaded does not apply in such cases. The question presented for our consideration is whether or not the evidence established the estoppel claimed.

While the suit of Blakeman against the Miller heirs for specific performance was pending, one Rosenstock, being about to purchase the lot adjoining Blakeman's lot on the east, was informed that the building on that lot extended over the west line thereof upon the lot described in the deeds to the Blakeman lot, covering a strip of the latter $7\frac{3}{4}$ inches wide at

the north end and $6\frac{7}{8}$ inches wide at the south end. Wishing to settle all disputes about his boundary and title before buying, Rosenstock asked Blakeman to make him a quitclaim deed for this strip. This was agreed to and Rosenstock agreed to pay two thousand dollars for the deed. To satisfy his fears Rosenstock required that the Miller heirs should join in quitclaiming to him. Blakeman and the Millers thereupon executed a written agreement, reciting the description of the Blakeman lot as hereinbefore given, the pending suit for specific performance, and, in effect, that the west wall of the Rosenstock building projected over the east line of the lot as thus described and bounded, covering the strip proposed to be quitclaimed to Rosenstock, and providing that the two thousand dollars should be deposited with a trust company to be by it held until the suit for performance was determined and then paid to the party who should finally prevail in said suit, whereupon both parties should quitclaim to Rosenstock the strip covered by his building. This agreement was carried out, the suit terminated in favor of Blakeman, the two thousand dollars was paid to him, and he and the Millers, by separate deeds, quitclaimed to Rosenstock. Thereafter the Millers, as before stated, quitclaimed to Young the strip on the west side of Blakeman's lot, covered by Blakeman's building and described in the complaint, claiming, as it now appears, that by reason of the conduct of Blakeman in asserting title to the strip on the east side and receiving the two thousand dollars from Rosenstock, he is estopped to claim title to the strip on the west side, even if their deed to him did have the effect of transferring the title up to the agreed line and beyond the true theoretical line. The evidence shows that Blakeman, in making the arrangement with Rosenstock for the payment of the two thousand dollars did not fix that sum as the value of the strip to be conveyed to Rosenstock, but only as the amount which he estimated it might cost him to quiet his title to the land claimed and occupied by him on the west side of his lot.

We are of the opinion that the circumstances under which this agreement was made and executed did not create an estoppel as claimed. As we have seen, the instruments concerning the lot, executed after the agreed line was established, operated to convey title to the agreed line.

Hence, the option agreement with Apel bound the Millers to convey title to Blakeman, the assignee thereof, up to that line, and their deed in pursuance thereof transferred that title to Blakeman. The result of the suit for performance showed that the Millers had no legal defense to the suit and that they were bound to convey as agreed. It is clearly apparent from the whole case, that neither the Millers nor Blakeman had ever previously claimed title to the land under the Rosenstock building, and that Rosenstock's vendor had a good title thereto by adverse possession, if not by his title-deeds. Blakeman did not in any manner impose on the Millers, or conceal anything from them. It does not appear that the Millers were then claiming that they were not bound to convey to Blakeman the strip on the west side of the Blakeman lot, if they were bound to convey at all. Their defense to the suit for performance made no reference to any mistake in the boundary on either side of the lot, but was founded on other circumstances having no relation to the boundary lines. There is nothing to indicate that either party contemplated or claimed that, if Blakeman won the suit and the two thousand dollars, it would in any manner affect his right to a conveyance of all the land included in the Apel option up to the agreed line, or would give the Millers, after executing the conveyance, any right to a strip including the greater part of the Blakeman west wall. The respective values of the two strips are not shown. But as the east side strip was in the adverse possession of Rosenstock, and was only an average of seven inches wide, while the west side strip in Blakeman's possession, was of an average width of eleven inches, and the Miller deed would give him title thereto, and as it included part of his wall, so that if he had to relinquish it, he would be compelled to take down his west wall and reconstruct it again at a point eleven inches further east, it is reasonably certain that the strip on the west side was worth far more, and probably twice as much, as the strip deeded to Rosenstock. If Blakeman had understood that he was required to elect whether he would take one or the other and could not have both, as against the Millers, if he prevailed in the pending suit, it is not improbable that he would have refused to make any agreement with them, or with Rosenstock, to accept two thousand dollars in lieu of

his rights, and that he would have chosen to retain his rights in the strip on the west side. His relations with the Millers, however, were not of a character to put him to such election and he was entitled by his contract to a conveyance of all their rights in the premises. The most reasonable conclusion from the entire transaction as shown by the evidence is that both the Millers and Blakeman considered the two thousand dollars as equivalent to the expense of quieting the title to the strip on the west side of the lot, and that it was to go for that purpose to the party who succeeded in gaining title to the lot in the suit for performance. This would not give the losing party any right whatever, either to the two thousand dollars or to any part of the land. The plaintiff is claiming by virtue of what is usually designated as an equitable estoppel. If the defendant were held to be estopped, under the circumstances, it would clearly be an unjust and inequitable estoppel. The court was fully justified in refusing to make any finding on the subject of estoppel on the ground that the evidence was insufficient to establish any estoppel.

The judgment and order are affirmed.

Angellotti, J., Sloss, J., Henshaw, J., and Lorigan, J., concurred.

McFarland, J., expressed no opinion.

BEATTY, C. J., dissenting.—I dissent. Blakeman, after demanding and receiving the two thousand dollars paid by Rosenstock for the strip on the east of the Miller building, in my opinion, is estopped to claim the strip on the west under his conveyance from the Miller heirs. They were bound by their father's agreement to convey to Blakeman as assignee of Apel a twenty-foot lot and no more. Conceding that a conveyance according to the description in that contract might have been claimed by Blakeman to effect a transfer of the twenty feet covered by the building, he could not claim at the same time that it would transfer the strip east of the building which Rosenstock was desiring to acquire. Blakeman must be held to have known what he was seeking by his suit for specific performance, and to have known that if he took the strip on one side he must relinquish that on the

other. He made his election when he claimed the price of the strip on the east, and the decree and conveyance by which he got the legal title accurately described the particular twenty feet which he elected to take. The strip in controversy is not included in that description and remained to the Miller heirs who conveyed it to plaintiff. He had the title, legal and equitable, and should have prevailed.

[S. F. No. 4702. Department One.—April 30, 1908.]

GEORGE ALBERT ALDRICH, Appellant, v. ANNIE ALDRICH BARTON et al., Respondents; HELEN H. GREIG et al., Interveners, Respondents.

INSANE PERSONS—RESTORATION TO CAPACITY—CONSTRUCTION OF CODE—GUARDIANSHIP.—The provisions of section 1766 of the Code of Civil Procedure, respecting the restoration of an insane person to capacity, are not applicable to one who has been confined in an insane asylum without having been put under guardianship.

ID.—CERTIFICATE OF DISCHARGE FROM STATE HOSPITAL—WANT OF AUTHORITY—COLLATERAL ATTACK.—A certificate of discharge from a state hospital by an official having jurisdiction to make it, under section 2189 of the Political Code, is made by that section evidence of an adjudication that the person discharged had recovered; but it is open to collateral attack for want of authority to make it, and it may be shown that when it was made the apparently discharged person was not an inmate of the hospital, nor within the control of the superintendent when the certificate was made; and upon such showing, the certificate is ineffectual for any purpose.

ID.—TRUST UNDER WILL—CONSTRUCTION—ACTUAL RECOVERY FROM MENTAL INCOMPETENCY.—Where a trust under a will provided for title in trustees to provide an income for the support of an insane person, "so long as he shall be incompetent to hold and properly manage his affairs and property," the principal to be turned over to him upon his restoration "to mental soundness and capacity," the trust is to be construed as continuing until the actual recovery, *in fact*, from mental derangement or incompetency, rather than the mere making of an order purporting to declare such recovery.

ID.—CERTIFICATE PRIMA FACIE EVIDENCE.—A certificate of discharge granted under the act of 1897 (Stats. 1897, p. 331), or under the act of 1901 (Stats. 1901, p. 639), is merely *prima facie* evidence of sanity, and may be overcome by proof to the contrary.

ID.—RIGHT TO TERMINATE TRUST UNDER WILL—PROOF REQUIRED—SUPPORT OF FINDING.—In order to terminate the trust under the will the discharged person must prove restoration to a condition of competency in fact to manage his affairs. On this issue, the finding of the court was against him, and is supported by sufficient evidence.

APPEAL from a judgment of the Superior Court of Alameda County. John Ellsworth, Judge.

The facts are stated in the opinion of the court.

Aldrich & Gentry, for Appellant.

Drown, Leicester & Drown, for Defendants, Respondents.

A. Everett Ball, for Interveners, Respondents.

SLOSS, J.—William A. Aldrich, the father of the plaintiff, died on February 25, 1892, leaving a will dated the twenty-ninth day of October, 1891. In May, 1888, the plaintiff, George Albert Aldrich, had been duly committed to the Napa State Asylum for the Insane by a judge of the superior court of Alameda County, and he remained a patient in said asylum until after his father's death.

By said will the testator gave the residue of his estate to trustees, in trust, among other things, to appropriate and pay out of the net income derived from one fourth of such residue "so much thereof as may be required for the proper and comfortable maintenance, support and care of my son George Albert Aldrich, now at the state asylum for the insane in Napa County, California, so long as he shall be incompetent to hold and properly manage his affairs and property. Upon the restoration of my said son George Albert Aldrich to mental soundness and capacity to turn over and pay and deliver to him the said one fourth of such residue of my estate, with all increment and accumulations thereof, to have and to hold the same to him and his heirs forever. If, however, my said son George Albert Aldrich shall prove to be permanently of unsound mind and shall so continue up to the time of his death, the said one fourth of such residue of my estate shall, upon his death, pass to and be thereupon paid and delivered to and distributed among my heirs at law then living, ac-

according to the laws of the state of California then in force relating to the succession to the property of the estate of those dying intestate." The will was duly admitted to probate, and on the thirty-first day of May, 1893, at the close of the administration of the estate, a decree of distribution was made, whereby the residue of the estate was distributed to the trustees named in the will upon the trusts therein declared. The defendants Annie Aldrich Barton and Helen Aldrich Dunning are the sole remaining trustees.

This action was brought by plaintiff against such trustees to obtain a decree terminating the trust and requiring the defendants to account for and turn over to plaintiff one fourth of the residue of the estate. The complaint alleges that on or about January 30, 1905, the medical superintendent of the Napa State Hospital for the Insane filed with the secretary of the board of managers of said Napa state hospital his certificate of discharge of plaintiff; that on the first day of February, 1905, a copy of said certificate, certified by the secretary of the board of managers of said Napa state hospital, was filed with the county clerk of Alameda County and entered by said county clerk in a book kept by him for that purpose. It is further alleged that plaintiff was, prior to the commencement of this action, discharged from said asylum and restored to mental soundness and capacity.

The defendant trustees answered, admitting the filing and recording of the discharge in question, but averring on information and belief that said certificate of discharge is void and of no legal effect, and that the medical superintendent of the Napa State Hospital for the Insane did not, when he signed, made, or filed said certificate of discharge, have any jurisdiction over or concerning the person of the plaintiff or the subject-matter of the discharge of the plaintiff from the said hospital. They further alleged that at the time of said discharge, and at all times since the first day of January, 1905, the plaintiff was not in said hospital, nor a patient at said hospital, nor an inmate thereof, nor within the control nor under the jurisdiction of said hospital, or of the medical superintendent thereof or any of the officers of the same, nor within said county of Napa. The answer further denied that the plaintiff was, prior to the commencement of this action, or that he has been at any time restored to

mental soundness or capacity. Other matters are set up in the answer, but the statement here made is sufficient to make clear every point which need be considered in disposing of this appeal. There was also a complaint in intervention, filed by persons claiming to be heirs at law of the testator, and as such entitled to an interest in the trust fund upon the death of plaintiff, if he should remain incompetent until his death. The interveners joined with the defendants in opposing plaintiff's prayer for relief.

The court found in favor of the foregoing allegations and denials of the answer. With reference to the mental condition of the plaintiff, there is a finding numbered 11, as follows: "That said plaintiff George Albert Aldrich was not, at the date of the death of his said father, William A. Aldrich, to wit: on the 25th day of February, 1892, and that he was not on the 12th day of November, 1902, or on the said 30th day of January, 1905, and that he has not been at any time since the date of the death of his said father, and is not now of sound mind or competent to hold and properly manage his affairs and property, or restored to mental soundness or capacity; but that ever since the date of the death of his said father he has been, and he is now, of unsound mind and incompetent to hold and properly manage his affairs." As conclusions of law the court found that the discharge of plaintiff from the said asylum did not terminate or extinguish the said trust, but that the same still continues. A decree, denying the plaintiff any relief and declaring the right of the defendants to hold the property upon such trust, followed. The plaintiff appeals and brings up the evidence by a bill of exceptions.

While the record contains numerous exceptions, but a single question is presented. The plaintiff relies exclusively upon the certificate of discharge given by the superintendent of the state asylum, or hospital, as it is now called, on January 31, 1905. By an act of March 26, 1903 (Stats. 1903, p. 485), chapter 1 of title V of part 3 of the Political Code was repealed, and there was substituted therefor a new chapter comprising sections 2136 to 2199, inclusive, of that code, and dealing with the care and custody of insane persons, etc. Section 2189 deals with the discharge of patients from state hospitals. Subdivision 1 of that section authorizes the superintendent of a state hospital to discharge "A patient who,

in his judgment, has recovered," and subdivision 6 provides that "When any person is discharged as recovered from a state hospital, a copy of the certificate of discharge duly certified by the secretary of the board of managers, may be filed for record with the clerk of the superior court of the county from which said person was committed. . . . Such certified copy of such certificate and the record of the same shall have the same legal effect as the original, and if no guardian has been appointed for such person, as provided by sections 1763 and 1764 of the Code of Civil Procedure, such certificate and duly certified copies thereof and such record thereof shall have the same legal force and effect as a judgment of restoration to capacity made under the provisions of section 1766 of the Code of Civil Procedure."

The contention of the plaintiff is that, by this provision, the certificate of discharge of the superintendent is made final and conclusive upon all parties. It is expressly conceded that if the court was authorized to go behind the certificate and inquire into the question of whether, as a matter of fact, the plaintiff had ever become competent, the evidence is ample to sustain finding 11 above quoted, to the effect that he had not at any time since the date of his father's death been of sound mind or competent to hold and properly manage his affairs and property, or restored to mental soundness or capacity.

There is no discussion in the briefs regarding the proper construction of the trust clause, both parties apparently assuming that the event upon which the testator intended to make the plaintiff's right to the principal of one fourth of the residue depend was his actual recovery, *in fact*, from mental derangement or incompetency, rather than the mere making of an order purporting to declare such recovery. And this, we think, is the proper interpretation of the clause. The testator provided that the trust should continue so long as the plaintiff should be incompetent. Upon his "restoration to mental soundness and capacity," he was to receive the *corpus* of the trust. The phrase "restoration to capacity," standing alone, might be construed to mean a judicial or other adjudication of restoration, regardless of the actual fact. But the only proceeding known to our law which, at the date of testator's will, could with propriety be designated

as a "restoration to capacity" was the proceeding defined in section 1766 of the Code of Civil Procedure, and that proceeding was not applicable to the case of one who was confined in an insane asylum without having been put under guardianship. (*Kellogg v. Cochran*, 87 Cal. 192, [25 Pac. 677].) Leaving out of consideration such relief as might be afforded by a court on *habeas corpus*, the asylum authorities alone had power to affect the *status* of such person, and while a discharge by such authorities was an adjudication that the person committed has recovered from insanity (*Kellogg v. Cochran*, 87 Cal. 192, [25 Pac. 677]), it afforded, prior to the enactments of 1903, only *prima facie* evidence of legal capacity in the person so discharged. (Civ. Code, sec. 40.) Such order of discharge is not fairly within the meaning of the phrase "restoration to mental soundness and capacity," as used by the testator. What effect it may have as evidence of such restoration is another question.

The appellant, as has been stated, takes the position that a certificate of discharge which formerly only raised a presumption of capacity is, if issued under section 2189 of the Political Code, as that section now reads, conclusive evidence of restoration to capacity of the person discharged. This contention is based upon the provision of the statute that such certificate shall have "the same legal force and effect" as a judgment of restoration under section 1766 of the Code of Civil Procedure. The proceeding defined in section 1766 is, in its nature, a judicial proceeding. In it a court, upon application by petition on behalf of a person declared incompetent, and after notice to adverse parties and a hearing, is authorized to "judicially determine" the fact of the restoration to capacity of such person. The judgment rendered in such case is one "in respect to the personal, political, or legal condition or relation of a particular person," and, when rendered by a court having jurisdiction to pronounce the judgment or order, is "conclusive upon . . . the condition or relation of the person." (Code Civ. Proc., sec. 1908.) The decision in *Kellogg v. Cochran*, 87 Cal. 192, [25 Pac. 677], established the proposition that this proceeding had no application to the case of a person who had been committed to an insane asylum, but had not been put under guardianship by virtue of sections 1763 and 1764 of the Code of Civil Pro-

cedure. The legislature, in enacting section 2189 of the Political Code, doubtless intended to afford to persons who, upon recovery, should be discharged from insane asylums, some record proof, which should operate to establish their recovery in the same way that the judgment of restoration under section 1766 of the Code of Civil Procedure operated in the case of persons who had been declared incompetent, and for whom guardians had been appointed. That is to say, the certificate, *when made by an official having jurisdiction to make it*, was made evidence of an adjudication of the fact that the person discharged had recovered. But the argument of the appellant goes, and, as will appear, necessarily goes, further than this. He contends that the certificate of discharge, in and of itself, conclusively proves the jurisdiction of the superintendent to make it; that is to say, that it cannot be collaterally attacked even for want of jurisdiction, unless such want of jurisdiction appears on the face of the record. This is, no doubt, the rule applicable to judgments of courts of general jurisdiction. (*Carpentier v. Oakland*, 30 Cal. 439; *Hahn v. Kelly*, 34 Cal. 402, [94 Am. Dec. 742]; *Drake v. Duvenick*, 45 Cal. 464; *Lyon v. Petty*, 65 Cal. 325, [4 Pac. 103]; *Bennett v. Wilson*, 133 Cal. 379, [85 Am. St. Rep. 207, 65 Pac. 880].) We need not here decide whether the superior court, acting under the provisions of section 1766 of the Code of Civil Procedure, is to be regarded as the court of general or one of limited jurisdiction. In any view, we are satisfied that the statute giving to the certificate of discharge the same legal force and effect possessed by a judgment under section 1766 of the Code of Civil Procedure is not to be construed as putting it beyond the power of a party against whom such certificate is offered to show that in fact it was issued in a case in which the superintendent of the asylum had no power to act. It is not to be supposed that the legislature intended to give to an executive officer, acting *ex parte*, the power to determine conclusively, even as against collateral attack, that he had jurisdiction, when in fact he had none. It is not necessary to decide whether the effect contended for could, under fundamental constitutional restrictions, be given to a certificate such as the one here relied on. Nor need we consider, whether, even if issued in a case within the jurisdiction of the superintendent, such certificate

can constitutionally be made conclusive evidence of restoration to capacity. It is enough, for the purposes of this case, to say that the reasonable interpretation of section 2189 of the Political Code is that it purports to make a certificate conclusive as against collateral attack, if issued by one having authority, in the particular case, to make it, but that such certificate always remains open to attack for want of such authority. The purpose of this section was to give to a certificate of discharge the effect of a judgment, as an adjudication of a fact, not to confer upon it any evidentiary value as conclusive proof of jurisdiction to make such adjudication.

The court found that, at the time of said discharge, the plaintiff was not in the Napa State Hospital for the Insane, nor a patient at said hospital, nor an inmate thereof, nor within the control of the hospital or the medical superintendent thereof. These findings are fully sustained by the evidence, which shows that plaintiff was released from the asylum on parole in 1892. Between that time and 1900 he went to the asylum occasionally to visit the physicians. Since 1900 he has not been to the asylum at all. In 1902 there was granted to plaintiff, at his request, a certificate of discharge. The discharge of 1902, whether valid or not, was treated as effectual by the asylum authorities and by the plaintiff. Plaintiff had no communication thereafter with any official of the asylum until 1905, when he applied for the certificate now relied on. This certificate was issued by Dr. Stone, whose incumbency of the office of medical superintendent began after plaintiff left the asylum. The certificate was issued after an examination of plaintiff made by Dr. Stone at San Francisco.

There can be no doubt that the jurisdiction of the superintendent of an insane asylum to discharge a person as recovered from insanity exists, under section 2189 of the Political Code, only where such person is a patient in the asylum. The only authority given to the superintendent by the statute is to discharge a "patient" and that by such patient is meant one who has been committed to the asylum and has remained there (except in case of a temporary absence as on parole) for care and treatment, is clear from a reading of the entire chapter of the Political Code dealing with the commitment.

and care of insane persons. One who has for many years been away from the asylum, claiming, without opposition, to have been discharged by virtue of an order purporting to have that effect, and over whom the asylum authorities do not exercise, or claim the right to exercise any power or restraint whatever, cannot be said to be a "patient" within the meaning of the law. Such was the condition of the plaintiff, as is found by the court on ample evidence.

Nor would plaintiff's situation be improved if the discharge of 1902 could be regarded as valid, either under the act of 1897 covering the commitment and care of insane persons (Stats. 1897, p. 331), or under the act of 1901, providing for the discharge of persons who have been committed to a hospital for the insane, but are not confined in such hospital. (Stats. 1901, p. 639.) A certificate granted under either act would afford no more than *prima facie* proof of sanity.

The certificate of 1905, having been issued without authority, was ineffectual for any purpose, and the plaintiff's right to recover depended upon his establishing that he had in fact been restored to a condition of competency. On this issue, the finding was against him, and, as is conceded, there was sufficient evidence to support the finding.

Since every point made by appellant is based on the claim that the certificate was conclusive in his favor, it follows that the court below rightly gave judgment for the defendants.

The judgment is affirmed.

Angellotti, J., and Shaw, J., concurred.

[S. F. No. 4575. Department One.—April 30, 1908.]

J. HERZOG and AUGUSTA HERZOG, Appellants, v.
ATCHISON, TOPEKA AND SANTA FE RAILROAD
COMPANY, Respondent.

SPECIFIC PERFORMANCE—CONTRACT FOR LOCATION OF RAILROAD STATION—
WHEN ENFORCEABLE.—A contract for the location of a railroad station may be enforced specifically, where it is fair and just and leaves the railroad free to serve the public interests by the location

of additional stations as they might be needed, without limitation of number or location.

ID.—WHEN NOT ENFORCEABLE.—Specific performance of a contract for such location will not be enforced, to subserve mere private interests, in such manner as to hamper the railroad in the performance of its duties to the public, or if the contract is to establish no other stations within a given distance of the agreed location, or where the enforcement of the contract would impose a great burden on the defendant without corresponding benefit to the plaintiff, or would be detrimental to the interests of the public.

ID.—SHOWING OF FAIRNESS AND JUSTICE REQUIRED—ADEQUACY OF CONSIDERATION.—A complaint for specific performance of a contract must, in order to be sufficient as against a general demurrer, state facts from which the court may determine that the consideration is adequate, and that the contract is as to the defendant, fair, just, and reasonable, and that it would not be inequitable to enforce it.

ID.—INSUFFICIENT COMPLAINT TO ENFORCE SPECIFIC PERFORMANCE OF CONTRACT FOR STATION.—Where the complaint for specific performance of a contract for the location of a railway station lacks the showing of fairness, justice, and reasonableness of the contract, or the adequacy of its consideration, and does not state the value of the right of way conveyed to the company as the consideration for the contract, nor allege the cost to the defendant of compliance with the contract, nor show that plaintiffs are the owners of any land near the proposed station, and fails to show that the recovery of damages for breach of the contract would not be an adequate remedy, it is wholly insufficient, as against a general demurrer.

ID.—ALLEGATION OF PAST OWNERSHIP—PRESUMPTION OF CONTINUANCE INAPPLICABLE.—The allegation in the complaint that plaintiffs owned land adjoining the right of way in 1881, is not an allegation that they owned it at any later date. The presumption of the continuance of facts shown to exist, is merely a rule of evidence and not of pleading, and cannot dispense with the averment of the fact of continued ownership.

APPEAL from a judgment of the Superior Court of Alameda County. Henry A. Melvin, Judge.

The facts are stated in the opinion of the court.

J. J. Scrivner, and Alfred H. Cohen, for Appellants.

T. J. Norton, H. D. Pillsbury, and E. E. Milliken, for Respondent.

SLOSS, J.—To plaintiffs' complaint the defendant interposed a demurrer for want of facts constituting a cause of

action. The demurrer was sustained without leave to amend, and plaintiffs appeal from the ensuing judgment in favor of defendant.

The complaint states these facts. On September 20, 1881, and long prior thereto the plaintiffs were the owners and in possession of a tract of land in Alameda County containing some sixty-five acres. On September 30, 1881, the California and Nevada Railroad Company executed and delivered to plaintiffs a writing whereby, in consideration of plaintiffs "signing for" a right of way for said railroad over their land, the railroad company agreed to "establish and maintain a permanent station to deliver and take passengers and freight at each passing train, said station to be situated at the north side of said Alcatraz Avenue and on the west side of Lowell Street, and to receive and discharge passengers from all but express trains upon proper signal." At the same time, and in consideration of the execution and delivery of this instrument, the plaintiffs signed and delivered to the railroad company the right of way over their lands referred to in the instrument. Subsequently, the California and Nevada Railroad Company laid down railroad tracks over such right of way and operated passenger and freight trains thereon. In 1893 the defendant, Atchison, Topeka and Santa Fe Railroad Company, purchased of the California and Nevada Railroad Company the right of way granted by plaintiffs and has ever since been in possession of the same, and has been operating passenger and freight trains thereon. At the time of its purchase the defendant had notice of its predecessor's agreement with plaintiffs and assumed the obligation to perform the same.

Neither the defendant nor its predecessor in interest has ever established or maintained a permanent or any station at the place or for the purposes specified in the agreement, nor has either of them stopped any train at such place. On June 2, 1904, plaintiffs requested the defendant to comply with the terms and conditions of said agreement, but the defendant has failed and refused to perform any of such terms and conditions. Plaintiffs have, upon their part, performed all the terms and conditions required of them to be performed. On account of the failure and refusal of the defendant to so comply, plaintiffs "have suffered great and irreparable dam-

age, and if said terms and conditions, as aforesaid, are not carried out and performed by defendant, these plaintiffs will continue to suffer great and irreparable damage."

The complaint concludes with a prayer for a decree compelling the defendant to establish a station as agreed, to deliver, receive, and discharge passengers thereat, and to stop all trains except express trains, at such station for these purposes.

The action is clearly one for specific performance of a contract, not to recover damages for its breach (*Pittsburgh Coal Co. v. Greenwood*, 39 Cal. 71; *Bohall v. Diller*, 41 Cal. 532; *Prince v. Lamb*, 128 Cal. 130, [60 Pac. 689]), and the sole question is whether the complaint alleges facts entitling the plaintiff to the equitable relief sought. It is argued by the respondent that it is the duty of railroad corporations, which are performing functions partaking of a public character, to locate their stations at places where they will best serve the public needs and convenience, and that, accordingly, a court of equity will not, in order to subserve mere private interests, compel the location of stations for the stopping of trains in such manner as to hamper the company in the performance of its duties to the public. The rule thus invoked has been applied to cases more or less similar to the present one. (*Texas and Pacific Ry. Co. v. City of Marshall*, 136 U. S. 393, [10 Sup. Ct. 846]; *Beasley v. Texas and Pacific Ry. Co.*, 191 U. S. 492, [24 Sup. Ct. 164]; *Marsh v. Fairbury etc. R. Co.*, 64 Ill. 414, [16 Am. Rep. 564]; *Mobile etc. R. R. Co. v. People*, 132 Ill. 559, [22 Am. St. Rep. 556, 24 N. E. 643]; *St. Joseph etc. R. Co. v. Ryan*, 11 Kan. 602, [15 Am. Rep. 357]; *Pacific R. Co. v. Seely*, 45 Mo. 212, [100 Am. Dec. 369]; *Holladay v. Patterson*, 5 Or. 177; *Texas etc. R. Co. v. Scott*, 77 Fed. 726, [23 C. C. A. 424].) Nearly all of these cases, however, involved contracts which undertook to bind the railroad company, not merely to locate a station at a particular place, but to establish no other station within a given distance of such places. In such cases, it was the exclusive character of the accommodation contracted for that was thought by the courts to involve an attempt to interfere with the companies in the performance of their duty to the public. In other words, the common carrier could not be permitted to bind itself not to furnish accommodations wherever they

might be needed. This consideration does not apply to the case of a contract which merely binds the company affirmatively to furnish certain accommodations to the plaintiff, without in any way debarring it from fully complying with all its duties to others entitled to its service. The contract here alleged did not bind the company to limit in any degree the facilities to be furnished to the public. It required the establishment and maintenance of a station at a place named, but left the company free to establish additional stations as they might be needed, without limitation of number or location. Contracts similar to the one here in question have been specifically enforced. (*Hood v. North Eastern Ry. Co.*, L. R. 8 Eq. 666; *Lawrence v. Saratoga Lake Ry. Co.*, 36 Hun, 468, cited with approval in *Prospect Park etc. R. R. Co. v. Coney Island etc. R. R. Co.*, 144 N. Y. 153, [39 N. E. 17]; *Murray v. North Western R. R. Co.*, 64 S. C. 520, [42 S. E. 617].) Where such contracts are limited to the creation of a right to a certain station or train service at given points, without in any way making the right exclusive or infringing upon the company's obligation to furnish proper service at any other place where it may be needed, we are not prepared to hold that their enforcement would necessarily be violative of public policy. (*Texas and St. L. R. R. Co. v. Roberts*, 60 Tex. 545, [48 Am. Rep. 268]; *Int. & G. N. R. R. Co. v. Dawson*, 62 Tex. 260; *Greene v. West Cheshire Ry. Co.*, L. R. 13 Eq. 44.)

A different question is presented where, upon the trial, or from the allegations of the bill, it appears that the enforcement of the contract would impose a great burden upon the defendant, with a slight or no corresponding benefit to the plaintiff, or that such enforcement would be detrimental to the interests of the public. Such circumstances, showing that the performance sought would be oppressive or inequitable, will warrant the denial of specific relief. (6 Pomeroy's Equity Jurisprudence, sec. 796; *Conger v. New York etc. R. R. Co.*, 120 N. Y. 29, [23 N. E. 983]; *Murdfeldt v. New York etc. R. R. Co.*, 102 N. Y. 703, [7 N. E. 404]; *Clark v. Rochester R. R. Co.*, 18 Barb. 350.)

The consideration last suggested points directly to a fatal objection to the complaint under discussion. It is thoroughly settled in this state that a complaint for specific performance

must, in order to make out a case good as against general demurrer, state facts from which the court may determine that the consideration is adequate, and that the contract is as to the defendant just and reasonable. (Civ. Code, sec. 3391.) In *Agard v. Valencia*, 39 Cal. 302, the court says: "Another well-established rule of courts of equity is, that in suit for specific performance, it must be affirmatively shown that the contract is fair and just, and that it would not be inequitable to enforce it. The court will not lend its aid to enforce a contract which is in any respect unfair or savors of oppression, but in such cases will leave the party to its remedy at law. It is incumbent upon the plaintiff, therefore, to state such facts as will enable the court to decide whether the contract is of such a character that it would not be inequitable to enforce it." This court has frequently restated its adherence to this rule. (*Bruck v. Tucker*, 42 Cal. 352; *Nicholson v. Tarpey*, 70 Cal. 608, [12 Pac. 778]; *Morrill v. Everson*, 77 Cal. 114, [19 Pac. 190]; *Windsor v. Miner*, 124 Cal. 492, [57 Pac. 386]; *Prince v. Lamb*, 128 Cal. 120, [60 Pac. 689]; *Stiles v. Cain*, 134 Cal. 170, [66 Pac. 231]; *Flood v. Templeton*, 148 Cal. 374, [83 Pac. 148]; *White v. Sage*, 149 Cal. 613, [87 Pac. 193].)

The complaint in this case is entirely devoid of any showing of this character. The value of the right of way conveyed is not stated, nor is there any allegation of the cost to the defendant of compliance with its contract. No attempt is made to state any facts indicating the adequacy of the consideration or the fairness of the contract. There is not even an allegation in general terms of the conclusion that the contract is just and fair as between the parties. As bearing upon the question whether the granting of the relief sought would be equitable, it is to be observed that the complaint does not aver that the plaintiffs, at any time since 1881, have been the owners of any land in the neighborhood of the proposed station, or that they live near it. The allegation that they owned land adjoining the right of way in 1881 is not an allegation that they owned it at any later date. The presumption of the continuance of facts once shown to exist (Code Civ. Proc., sec. 1963, subd. 32), declares merely a rule of evidence and has no application to the statement of facts in a pleading (*Fredericks v. Tracy*, 98 Cal. 658, [33 Pac. 750].)

So far as appears from their complaint, the plaintiffs are endeavoring to enforce a bare legal right to have the defendant comply with the contract of its predecessor, without showing that such compliance would in any way add to their convenience or to the value of any property owned by them. The complaint, therefore, fails to show that the contract, as originally made was fair and just as between the parties or that it would be equitable to enforce it. Furthermore, it fails to show that the recovery of damages for a breach of the contract would not be an adequate remedy, a condition which is as essential to the obtaining of specific performance as of other forms of equitable relief for the infringement of legal rights. (*Senter v. Davis*, 38 Cal. 450; *Flood v. Templeton*, 148 Cal. 374, [83 Pac. 148].)

Respondent urges some additional points in support of the rulings sustaining the demurrer but these need not be discussed in view of the conclusions above expressed.

The judgment is affirmed.

Shaw, J., and Angellotti, J., concurred.

[S. F. No. 4621. Department One.—April 30, 1908.]

J. B. O'SULLIVAN, Respondent, v. S. N. GRIFFITH, Appellant.

FRANCHISE—STREET RAILROAD—GRANT OF RIGHT, TITLE, AND INTEREST.

—An instrument whereby the grantor grants "his right, title and interest in and to and under" certain street-railroad franchises in a municipality, is a transfer of the estate or property rights created by the original grant of the franchises and not merely of the document containing the grant.

ID.—FRANCHISE IS INCORPOREAL HEREDITAMENT.—The right to use the streets of a city as a way upon which to build and operate a street railroad is a right in real property, an incorporeal hereditament.

ID.—GRANT EQUIVALENT TO QUITCLAIM DEED—WANT OF TITLE IN GRANTOR.—A grant whereby the grantor purports to convey only his right, title, and interest in certain street-railroad franchises, with no covenants of title, is in effect a mere deed of quitclaim, and in the absence of fraud or mistake, the grantee is not relieved from

the obligation of paying the purchase price merely because the grantor had no title to the franchises. The same rule would obtain if the grant were regarded merely as a transfer of the instruments by which the franchises were granted.

ID.—COVENANT OR WARRANTY — RECITAL IN GRANT—FRANCHISE “DULY GIVEN.”—The law will not imply a covenant or warranty that the franchises purporting to be conveyed were valid from a mere recital in the instrument of transfer that they had been “duly given” to the grantor and his assignors. A covenant or warranty is never implied from a mere recital. Words sufficient to create an agreement are essential.

ID.—LAW OF FOREIGN STATE—PRESUMPTION.—In the absence of proof to the contrary, it is presumed that the law of another state respecting the transfer of a street-railroad franchise, is the same as the law of this state.

ID.—PRESUMPTION APPLIES TO STATUTORY LAW.—The presumption in this state as to the similarity of the laws of a foreign state applies to statute law as well as to the common law.

ID.—TRANSFER OF STREET-RAILROAD FRANCHISE.—In this state a street-railroad franchise may be transferred whether held by a corporation or a natural person, and no formal or express consent of the state is necessary. And in the absence of proof to the contrary, the law of Nevada is presumed to be the same.

ID.—CONSENT OF STATE NOT NECESSARY TO TRANSFER.—A provision in a grant of a street-railroad franchise requiring the grantee to form a corporation to build and operate a street-railroad and to cause corporate bonds to be issued to the grantor in payment for the franchise, is not contrary to public policy or of such effect as to make the entire contract void.

APPEAL from a judgment of the Superior Court of Fresno County and from an order refusing a new trial. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

N. C. Caldwell, for Appellant.

Smith & Ostrander, for Respondent.

SHAW, J.—Appeal from a judgment and from an order denying defendant's motion for a new trial.

Plaintiff sued to recover two thousand seven hundred dollars alleged to be due as the purchase price of all the right, title, and interest of plaintiff and J. Wiseman MacDonald in certain street-railroad franchises in Reno, Nevada, sold and conveyed by plaintiff and MacDonald to the defendant.

The conveyance to the defendant recited the fact that the franchises had been duly given to the plaintiff and two other persons who had subsequently transferred their interest to the plaintiff, and then proceeded thus: "Now it is witnessed that for a valuable consideration the said J. B. O'Sullivan hereby grants, bargains, sells, conveys and assigns to S. N. Griffith, of Fresno, California, all and every his right, title and interest in and to and under said franchises and each of them." MacDonald had previously obtained from O'Sullivan an option to purchase the franchises, and a clause was added to the effect that he likewise assigned and conveyed to O'Sullivan his interest under the option. A separate instrument of the same date was simultaneously executed, whereby Griffith agreed that he would at once form a corporation to build and operate the roads and cause it to issue bonds secured by a mortgage upon the roads and would buy said bonds to the amount of two thousand seven hundred dollars, par value, and deliver the same to MacDonald within six months from the date of the contract, and that, "if said bonds are not issued and delivered in said time, the said Griffith shall pay to the said MacDonald the sum of twenty-seven hundred dollars." MacDonald assigned to plaintiff all his interest under the contract. The defendant did not cause said bonds to be issued and delivered to MacDonald within the six months specified, or at all.

The defendant alleged in his answer that the promise to pay the money sued for was without consideration. This claim is based on allegations that, under the laws of Nevada, the proceeding by which the alleged franchises were granted to the original grantees were so defective in several particulars that they were wholly void and that, in consequence, the grants of the franchises were void, or, in other words, that the grantors of the defendant had no title to the franchises they attempted to convey to Griffith, that he received nothing for the transfer, and hence, that there was no consideration. In support of this answer defendant offered in evidence the law of the state of Nevada. An objection that the evidence was immaterial and incompetent was sustained, and this ruling is assigned as error.

Appellant's argument is in part based on the theory that the things granted and forming the consideration of the promise were the papers or documents by which the grant of the

franchise was manifested, and not the right to use the streets as a way upon which to construct and operate a street-railroad. This is not the effect of the conveyance to Griffith. O'Sullivan and MacDonald did not merely transfer the paper, but, as the instrument itself declares, O'Sullivan and MacDonald each granted "his right, title and interest in and to and *under* the franchises." This language purports to transfer the estate or property rights created by the original grant and not merely the document containing the grant. The right to use the streets of a city as a way upon which to build and operate a street-railroad is a right in real property, an incorporeal hereditament. (*Stockton etc. Co. v. San Joaquin Co.*, 148 Cal. 319, [83 Pac. 54].) The grant to Griffith purports to convey only the right, title, and interest of the grantors, with no covenants of title, and is, in effect, a mere deed of quitclaim. (*Gee v. Moore*, 14 Cal. 472; *Allan v. Holton*, 20 Pick. (Mass.) 458.) The case therefore stands upon the same ground as a suit for the price of land granted by quitclaim deed, where the grantor had no title in the premises. "It has long been the settled rule at the common law, that where there are no covenants of seizin, etc., in the deed, the defendant cannot avoid payment of the purchase money on the ground that the title existed elsewhere than in the grantor." (*Fowler v. Smith*, 2 Cal. 44.) It is no defense to a note given in consideration of the conveyance to the maker of all the interest of the payee in a tract of land, that the payee had no interest in the land, unless the sale was procured by the fraud of the payee, or by reason of mistake of such a character that equity would relieve the maker from its effects. (Rawle on Covenants, sec. 321; *Perkins v. Bradford*, 3 N. H. 522; *Tobin v. Bell*, 61 Ala. 125; *Owens v. Thompson*, 4 Ill. 502; *Hulett v. Hamilton*, 60 Minn. 21, [61 N. W. 672]; *Smith v. Winston*, 3 Miss. 601; *Foy v. Haughton*, 85 N. C. 168; *Cross v. Noble*, 67 Pa. St. 74.) The defendant, by the conveyance, obtained exactly what his contract calls for,—that is, all the right, title, and interest of the grantors in and under the franchises. No fraud or mistake is alleged. The grantors did not covenant that they had any interest, but only conveyed such as they had. In such cases the purchaser is deemed to take all the risk of title upon himself. The answer did not show a want of consideration and the evidence was properly rejected.

The appellant assumes, without argument, that from the recital in the instrument transferring the franchises to him that the franchises had been "duly given," the law will imply a covenant or warranty that they were valid. This assumption is not well founded. In Rawle on Covenants, section 280, that author says: "Owing to a misapprehension of one or two old cases, the dangerous doctrine has been more than once broached that covenants for title may be implied from a recital, but this has since been distinctly and decisively repudiated." A covenant or warranty is never implied from a mere recital. The true rule is thus stated in Comyn's Digest, quoted with approval in *Hale v. Finch*, 104 U. S. 269: "Any words in a deed which show an agreement to do a thing, make a covenant. But where words do not amount to an agreement, covenant does not lie." An agreement may be set forth in a deed as well as in any other writing. And where it is so expressed, an action will lie for its breach whether it is contained in a recital or elsewhere in the conveyance. But it must be so drawn as to express a contract, and a mere recital that a fact has transpired, that a franchise has been duly given, cannot be turned into an agreement to be held responsible in the event that it was not legally granted. The recitals in the conveyance that the franchise in the city of Reno was duly given by the city council, and regularly confirmed at a special election, that the franchise in the county of Washoe was duly given and that both franchises had been duly transferred to O'Sullivan do not state any contract or agreement on the part of the grantors. They merely declare the chain of title and serve as a more particular description of the thing quitclaimed to Griffith. They might constitute an estoppel against the grantors in the instrument, but they do not express any agreement. (*Ferguson v. Dent*, 8 Mo. 669; *Peck v. Hensley*, 20 Tex. 678.)

The same rule would obtain if the grant is regarded merely as a transfer of the instruments by which the franchises were granted. In that event, there being no warranty, fraud, or mistake, the rule is that the doctrine of *caveat emptor* applies, and the fact that the instrument transferred was void, is no defense to an action for the price. (*Christy v. Sullivan*, 50 Cal. 337; *Sutro v. Rhodes*, 92 Cal. 117, [28 Pac. 98]; *Harvey v. Dale*, 96 Cal. 160, [30 Pac. 14].)

The case of *Mayer v. Richards*, 163 U. S. 383, [16 Sup. Ct. 1148], was decided according to the rule of the civil law prevailing in Louisiana, whereby a sale or transfer of the thing implies a warranty of title. (See *Fowler v. Smith*, 2 Cal. 44.) It has no application in this state, where the common-law rule on that subject prevails. We do not think the decision in *Amestoy v. Electric R. T. Co.*, 95 Cal. 311, [30 Pac. 550], announces a doctrine contrary to the common-law rule on this subject as settled by the decisions above cited.

The defendant further answered that under the law of the state of Nevada the franchises in question could not be assigned without the consent of the state. It may be conceded that the allegation on this point is an allegation of fact as to the law and not a mere conclusion. It is not necessary to decide the question whether or not it is sufficient in form, for there was no offer to prove the laws of Nevada on this point. The offer which counsel for the defendant made to prove certain things by the law of Nevada cannot reasonably be construed as an offer to prove that that law did not permit the transfer of a franchise of this kind without the consent of the state. The defense therefore must rest upon the presumption which prevails in this state concerning the law of another state in the absence of proof thereof. Such law in that case is presumed to be the same as the law of this state. (*Hickman v. Alpaugh*, 21 Cal. 266; *Hill v. Grigsby*, 32 Cal. 60; *Masters v. Lash*, 61 Cal. 624; *Shumway v. Leakey*, 67 Cal. 460, [8 Pac. 12]; *Mortimer v. Marder*, 93 Cal. 178, [28 Pac. 814]; *Lux v. Haggin*, 69 Cal. 255, [4 Pac. 919, 10 Pac. 674]; *Cavallaro v. Texas etc. Ry. Co.*, 110 Cal. 357, [52 Am. St. Rep. 94, 42 Pac. 918]; *Brown v. San Francisco Gas Co.*, 58 Cal. 426.) This rule applies to statute law as well as to the common law. (*Cavallaro v. Texas etc. Co.*, 110 Cal. 357, [52 Am. St. Rep. 94, 42 Pac. 918].) In this state a street-railroad franchise may be transferred, whether held by a corporation or natural person, and no formal or express consent of the state is necessary. (Civ. Code, secs. 494, 510, 511.)

The franchises in question were not personal property and the provisions of the civil law and the decisions relating to warranties implied from the sale of personalty have no application to this case. As above stated, there is no pleading attempting to show that the sale was made through fraud on

the part of the grantors or by the mistake of the defendant. It is not alleged that the defendant was ignorant of the actual facts in regard to the proceedings for the granting of the franchises nor that he relied on any representations or recitals in the deed, nor that he was not as well informed as to the validity of the franchises, both in law and in fact, as the plaintiff and MacDonald.

We do not perceive any ground on which to hold that the stipulations in the agreement sued on requiring Griffith to form a corporation to build and operate a street-railroad and to cause corporate bonds to be issued to MacDonald in payment for the franchises,—that is, the rights of way upon which the road was to be built,—are contrary to public policy or of such effect as to make the entire contract void. It seems to be a perfectly legitimate and valid undertaking.

The judgment and order are affirmed.

Angellotti, J., and Sloss, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank and filed the following opinion on the 12th of June, 1908.

BEATTY, C. J., dissenting.—Having dissented from the order denying a rehearing of this cause, I will here briefly state the grounds of such dissent.

A street-railway franchise is created and granted by the same act. If in a case like this no franchise is granted, it is because no franchise is created. The defense to the action was not merely that the assignors of plaintiff had no title to the franchise, but that there had never been a franchise, and this was what the defendant offered to prove. If he had been allowed to make, and had succeeded in making, the proof that no franchise ever came into existence the case would have been materially different from that arising upon the conveyance of all one's right, title, and interest in a tract of land. There would have been the wide difference between the conveyance of a thing in existence, and of a thing nonexistent, and the authorities cited to the proposition that the purchaser of a possible title to a tract of land cannot avoid payment of the

agreed price by proving that the vendor had no title seem to me to have no application to an action to recover the agreed price of a thing which the vendor represented to be in existence, but which in fact never did exist.

[L. A. No. 1994. Department Two.—May 5, 1908.]

S. V. MONTGOMERY, Respondent, v. SUSANA O. DE PICOT and CHARLES PICOT, Appellants.

SPECIFIC PERFORMANCE BY ASSIGNEE—PERSONAL NOTE OF ASSIGNOR—MORTGAGE SECURITY—SUFFICIENCY OF TENDER.—Notwithstanding the use of the word “assignee” in a contract for the sale of real estate, if the contract calls for the mere personal note of the assignor, after payment of cash required, a specific performance cannot be enforced by the assignee without the tender of such personal note, unless the assignment has been expressly assented to by the other party to the contract; but where the contract calls for mortgage security, after such cash payment, and such security is the principal thing relied upon, the assignee may tender the cash payment and his own note and mortgage, and enforce specific performance, where the other party merely refused the tender, without specifically objecting that the personal note of the assignor was not also tendered.

ID.—ESTOPPEL TO OBJECT TO TENDER.—Under section 2076 of the Code of Civil Procedure, the defendants in the action for specific performance were estopped from asserting any objection to the tender of cash and mortgage security, which they did not make and which they could or should have made at the time it was offered, and which might have been obviated, if made; and they are precluded from asserting such objection at the trial, or upon appeal.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. B. N. Smith, Judge.

The facts are stated in the opinion of the court.

Denis & Loewenthal, for Appellants.

W. R. Hervey, for Respondent.

LORIGAN, J.—This is an action for specific performance of a contract for the sale of real estate.

The contract which was the basis of the action related to a purchase by W. G. Bradshaw of a tract of land in Los Angeles County owned by defendants and was executed by defendants and said Bradshaw on November 25, 1904, the defendants being designated therein as the parties of the first part and Bradshaw as party of the second part.

The portions of the contract material for consideration on this appeal are as follows: "That in consideration of the payment to them by the party of the second part of the sum of \$1,500.00, receipt whereof is hereby acknowledged, the said parties of the first part hereby agree to sell and convey . . . unto the said party of the second part, his heirs, executors and assigns, all that certain real property situated in the county of Los Angeles, state of California, described as follows, to wit: . . . upon the following terms and conditions: For the total price of \$45,000.00, \$1,500.00 of which has been paid by the party of the second part as above recited, \$10,000.00 to be paid by the said party of the second part, or his heirs, executors or assigns, on or before May 31st, 1905, . . . and the remainder of the said purchase price, to wit: the sum of \$33,500.00 on or before May 31, 1910, the said last mentioned sum to bear interest at the rate of 9 per cent. per annum, interest to be paid quarterly. And the said last deferred payment, to wit: the sum of \$33,500.00 to be evidenced by a promissory note dated June 1st, 1905, bearing interest at the rate aforesaid, to wit: 9 per cent. per annum until paid, payable on or before May 31st, 1910, secured by a mortgage upon the above described property . . . deed of said property to be delivered by the first parties to the second or assigns concurrently with the said second payment of \$10,000.00."

Subsequent to the execution of this contract Bradshaw assigned nine tenths of his interest therein to divers other parties, who, with himself, thereafter assigned the same to plaintiff. It is conceded that the plaintiff was a stenographer in the office of Mr. Hervey, an attorney at law, who in the transactions relative to said contract represented Bradshaw, his assignees, and plaintiff, and that the assignment to plaintiff of said contract was for the convenience of Bradshaw and

his assignees, and that plaintiff claimed no ownership or beneficial interest under the assignment, and was not financially responsible.

Some time before the date fixed in the contract therefor, Mr. Hervey, in the interest of the plaintiff and her assignors and accompanied by the latter, went to the residence of defendants and there tendered the personal note of plaintiff, secured by a mortgage on the land, conditioned as and for the amount provided in the contract, and likewise tendered defendants at the same time the ten thousand dollars in coin which the contract provided should be paid. The defendants refused to accept either the note or the mortgage or the money tendered.

Thereafter, this action was commenced by plaintiff against the defendants to obtain a decree of specific performance. A demurrer to the complaint—general and special—was interposed by the defendants and overruled. They answered, and after trial, judgment was entered in favor of plaintiff for the relief prayed for.

The defendants appeal from the judgment and from an order denying their motion for a different judgment made under sections 663 and 663½ of the Code of Civil Procedure, and also from an order denying their motion for a new trial.

It is insisted by appellants that their demurrer to the complaint should have been sustained on the ground that the facts alleged showed that the plaintiff was not entitled to the relief prayed for. In other words, that the complaint does not show that the plaintiff offered to observe or comply with the terms of the contract upon which suit is brought. In support of this contention it is claimed that the contract did not provide that the note of plaintiff should be given in satisfaction of it as tendered; that the contract provided and meant that the note of Bradshaw and no other person should be given; that it called for the personal obligation and liability of Bradshaw himself and that his assignee could not substitute her personal liability for that of Bradshaw and compel specific performance upon tender of her own note.

It is undoubtedly true that where a contract for the sale of land calls for the delivery of notes on the part of the vendee for deferred payments of the purchase price, the personal liability of the latter enters as a controlling element into the

contract and the offer or tender of notes of an assignee of the original vendee does not satisfy the terms of the contract nor warrant such assignee in asserting a right of specific performance based upon such a tender. As said in *Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U. S. 379, [8 Sup. Ct. 1308], "Every one has a right to select and determine with whom he will contract and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman 'you have the right to the benefit you anticipate from the character, credit and substance of the party with whom you contract.'" And, as declared in our code, the burden of an obligation may not be transferred without the consent of the party entitled to the benefit. (Civ. Code, sec. 1457.)

Whether a given contract is assignable or not is a question of construction. Now, as to the contract at bar. The reading of it discloses that by its terms it was assignable. It provides for a conveyance by defendants of the property to "said party of the second part (Bradshaw), his heirs, executors and assigns" upon the fulfillment of certain conditions by Bradshaw or his "heirs, executors or assigns." These, however, are general provisions of the contract and are not conclusive upon the subject of assignability. The use of such language in a contract is not in every case absolutely determinative of its character. (*Swarts v. Electric Light Co.*, 26 R. I. 436, [59 Atl. 111].) Notwithstanding its use the intention of the parties must be gathered from a consideration of the terms and entire tenor of the contract and if upon such consideration it appears that the contract calls for the performance of an obligation purely personal in its nature, the rule in general is that the obligation, if personal, cannot be assigned without the consent of the party to be benefited. (*Bethlehem v. Annis*, 40 N. H. 34, [77 Am. Dec. 700]; *Ice Co. v. Potter*, 123 Mass. 28, [25 Am. Rep. 9]; *Arkansas etc. Co. v. Belden Mining Co.*, 127 U. S. 379, [8 Sup. Ct. 1308].)

In *Rice v. Gibbs*, 33 Neb. 460, [50 N. W. 436], an optional contract for the sale of land was involved wherein it was provided that the covenants and agreements should extend to and be obligatory upon the heirs, executors, administrators, and assigns of the respective parties. The contract provided for a deed to be made by the vendor on the payment of a cer-

tain specified amount in money, other payments to be made within one and two years after the making of the deed, such deferred payments to bear interest. An assignee of the original vendee tendered the money in due time and notes for the deferred payments but not made by the original vendee. It was held that notwithstanding the language of the contract, an assignee financially irresponsible, could not substitute his own personal liability for that of the original vendee; that in a contract of sale where payment of a portion of the purchase price is deferred and there is no provision for securing such payment, it is a necessary inference that the character and solvency of the vendee was an inducement of the contract; and the contract cannot be assigned so as to permit the assignee to enforce it and compel the vendor to substitute the obligation of any other person than the one with whom the contract was made. In that case, however, the notes for the deferred payments were not to be secured by any lien or mortgage upon the property to be conveyed. The contract did not so provide. The vendors obligated themselves to an absolute disposition of the property on the execution simply of promissory notes for the deferred payments and obviously the financial responsibility of the original vendee must have entered as a controlling inducement to the contract. In this very essential respect that case differs from the case at bar. In the contract here, notwithstanding the provisions for assignability, if it appeared from a consideration of the whole contract that the personal financial responsibility of Bradshaw was a distinctive feature of it and appeared to be the material inducement to the contract, then under the general rule it would not be assignable without the consent of the vendors and the assignee would have no right to enforce it. But it seems quite plain from an examination of the contract that the personal financial responsibility of Bradshaw was not a material inducement for its execution. What was really relied upon was a mortgage upon the property for the unpaid portion of the purchase price and "a promissory note" evidencing this indebtedness was to be given. It is a matter of general knowledge that upon sales of real estate a mortgage back for a portion of the purchase price is one of the most common methods of dealing in such transactions. The mortgage is the main thing relied on when a substantial prior payment, as

in this case, is made on the purchase price, the financial responsibility of the vendee on the note itself evidencing the debt for the balance, is a matter of very little importance to the vendor. And in contracts for the sale of real property which in terms run in favor of assignees and which provide for a promissory note and mortgage to secure the balance of the purchase price, the general construction will be that the promissory note is a mere incident to the transaction and that the principal thing relied on is the mortgage. It is a very easy matter when reliance is intended to be placed on the financial responsibility of the original vendee to specify in the contract that in addition to the mortgage his personal obligation shall be given. When this is not done and a mortgage to secure "a promissory note" is alone called for, as in the contract here, such provision will be construed as making the giving of a mortgage, not the giving of a note, the material inducement to the contract; that under such circumstances the obligation is not personal and may be assigned and specific performance on proper tender had at the suit of the assignee.

Aside from this, however, it appears from the record that the defendants are estopped from questioning the sufficiency of the tender made by plaintiff. The evidence in that regard is that the agents and attorney of plaintiff within the time limited in the option—in fact fully eight days before it would have expired—made a tender at the residence of defendants some miles outside of the city of Los Angeles, in which they complied in all respects with the conditions of the contract save that the note tendered was that of the plaintiff and not of Bradshaw. They not only made an actual tender but delivered also to defendants a written offer, notice, and demand covering the terms of the contract. When the actual tender was being made defendants said they did not want the money and did not want to hear the papers read—the note, mortgage, and deed—but at last consented to have the matter explained to them. The upshot of the effort on the part of plaintiff to have the defendants accept the tender was that they flatly refused to accept anything or to do anything in the matter. After refusing to do so they requested Mr. Hervey, representing plaintiff, to take the papers to Mr. Denis, who was their attorney. On the following day Mr. Hervey

left the papers with the latter. Subsequently and during the eight days prior to the date limiting the exercise of the option no word was heard concerning the matter from either appellants or their attorney. When the tender was made to the defendants at their residence, no objection to it was made on account of any non-compliance with the terms of the contract; it was not claimed or intimated that the promissory note should have been signed by Bradshaw or that the defendants were entitled to or wanted Bradshaw's note, or that they refused the tender because the note offered was that of plaintiff and not Bradshaw. They simply refused to accept the note or mortgage or make the deed without assigning any other reason than that they did not want the money and would not do so.

It is provided that "The person to whom a tender is made must at the time specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires or be precluded from objecting afterwards." (Code Civ. Proc., sec. 2076.) This section is applicable to the facts recited, and defendants were estopped from asserting any objection to the tender which they could or should have made at the time it was offered. Had the objection now urged been asserted then and the tender refused on that ground it might have been possible for the plaintiff to have obtained a tender of the note of Bradshaw. There was ample time after the tender and before the option expired to have done so. It appears too as a certainty from the record that she could have done so had it been objected that she did not. No objection having been made on that score when it should have been made, the defendants were precluded from asserting it upon the trial or from insisting upon it now.

No other points urged for a reversal are in our judgment tenable.

The judgment and orders appealed from are affirmed.

Henshaw, J., and McFarland, J., concurred.

A hearing in Bank was denied on June 4, 1908, when the following opinion was rendered.

THE COURT.—The petition for rehearing is denied, but in disposing of it it may be said that the offer of the note of an insolvent person, made with design to escape personal responsibility, would perhaps make the contract unfair to the extent that equity would not enforce it. But this objection was fully removed by the tender of the note of Bradshaw, the original vendee, which was made at the trial, and the defendant having then refused to accept the same, the court below was fully justified in rendering the decree for performance upon making of the cash payment and giving the note of the plaintiff.

[S. F. No. 4208. Department One.—May 11, 1908.]

STANLEY STERNE, by William G. Cousins, his Guardian ad Litem, Respondent, v. MARIPOSA COMMERCIAL AND MINING COMPANY, Appellant.

NEGLECT—MASTER AND SERVANT—PLEADING—ALLEGATIONS AS TO LEGAL DUTY OF DEFENDANT.—In an action by an employee against his employer to recover damages for personal injuries alleged to have been occasioned by the latter's negligence, mere allegations of the legal duty of an employer to his employees in the matter of furnishing suitable tools and appliances, and keeping the same in proper repair, tender no issue of facts, and the failure to deny them in the answer in no way affects the determination of the case, which must be determined upon the facts admitted or proved, in the light of the law as settled by the statutes and decisions.

ID.—DIFFERENT THEORIES OF LIABILITY—FAILURE TO FURNISH SUITABLE APPLIANCES.—In such an action, where the plaintiff sought to hold the defendant liable upon the theory that it had failed to use reasonable care in the matter of furnishing suitable appliances to the plaintiff with which to work, and also upon the theory that it had negligently sent him, without warning, to work in a dangerous place, and it is impossible to determine from the record upon which theory the jury rendered a verdict against the defendant, a reversal will be ordered, if any prejudicial error was committed by the trial court in regard to the issue relative to the furnishing of suitable appliances.

ID.—EVIDENCE—CROSS-EXAMINATION—MOTION TO STRIKE OUT.—On the trial of such action, the plaintiff, on his direct examination, testified as to the mechanical appliances that were and were not on the premises where he was working, and described their construction.

On cross-examination, he was asked where he acquired the information he had given respecting such appliances. In response, against the defendant's protest and motion to strike out, he was permitted to answer that he was told by a certain person, who was an employee of the defendant, having charge of part of the machinery, that if a certain different appliance had been used he never would have been hurt. *Held*, that the answer was not responsive to the question, and that the refusal to strike it out was prejudicial error.

ID.—DESIGNATION OF EVIDENCE TO BE STRICKEN OUT.—The rule that where a portion of the testimony of a witness is unobjectionable the party moving to strike out must designate with precision the particular portion challenged, has no application where the whole answer is subject to the objection made.

ID.—INSTRUCTIONS AS TO NEGLIGENCE—WANT OF CARE IN FAILING TO FURNISH PARTICULAR APPLIANCE.—In an action by an employee against his employer to recover damages for personal injuries on the ground of the latter's alleged negligence in failing to furnish suitable appliances with which to work, instructions to the jury are erroneous which make the question of the defendant's negligence to turn on the conclusion of the jury as to whether or not the appliance furnished and used was in fact suitable for the work as it was then being done, without regard to whether or not there had been any want of ordinary care on the part of the defendant or its personal representative, in failing to furnish another kind of appliance.

APPEAL from a judgment of the Superior Court of Mariposa County and from an order refusing a new trial. J. J. Trabucco, Judge.

The facts are stated in the opinion of the court.

Lindley & Eickhoff, J. M. Corcoran, and B. L. Quayle, for Appellant.

Charles F. Hanlon, for Respondent.

ANGELLOTTI, J.—This is an appeal by defendant from a judgment in favor of plaintiff for seven thousand dollars damages for personal injuries, alleged to have been suffered by him through the negligence of defendant, and from an order denying its motion for a new trial.

Plaintiff, a boy nearly seventeen years of age, was in the employ of defendant at its mine in Mariposa County. There was a hoisting plant operated by steam used in the mining work, and plaintiff was employed as fireman and in assisting

around the engine used as a part of such hoisting plant, and to perform certain other duties such as running the air compressor, etc., and there was evidence sufficient to sustain a conclusion that he was required to work wherever directed by one Pettis, the engineer of defendant. On March 13, 1903, certain repair work was done on the bearings on the pillow block of the hoist, on which bearings revolved the shaft of a cogged wheel. This work was done by Maguire, the general foreman and representative of the company at the mine, Pettis, Mills (a machinist), and one Thorn. This work having apparently been satisfactorily completed, Maguire ordered the engineer to start up the engine, and he and Thorn left the engine-room. The engine having been started, Mills was engaged in making a final adjustment about the pillow block and bearings, and, for the purpose of tightening one of the nuts, had applied to the nut a wrench variously denominated in the record a spanner or stationary wrench. At this point plaintiff appeared upon the scene. There was in plaintiff's own testimony evidence sufficient to support a conclusion that Pettis told plaintiff to get a monkey wrench and assist Mills in his work, although the other evidence indicates that Mills was already using a monkey wrench in connection with a spanner wrench in tightening the nut, the nut being so situated that it could not be turned without a combination of two wrenches. A monkey wrench was applied to the spanner wrench being used by Mills, and Mills holding in place the spanner wrench, plaintiff turned the spanner wrench by means of the monkey wrench, and was in the act of making a second turn when, according to plaintiff's contention, the spanner wrench in Mills's hands slipped sideways from the nut, and plaintiff's hand, in consequence thereof, came in contact with the cogs of the wheel and was so mutilated as to require amputation. The nut was hexagonal, and there had been supplied no socket wrench which would fit it.

Much is said in the brief of counsel for plaintiff as to the effect of the failure of defendant to deny certain allegations of the complaint which we take to be nothing more than attempted allegations of the legal duty of an employer to his employees in the matter of furnishing suitable tools and appliances, and keeping the same in proper repair. Such allegations had no proper place in the complaint and tendered

no issue of fact. The failure to deny them in the answer in no way affects the determination of the case, which must be determined upon the *facts* admitted or proved, in the light of the law as settled by our statutes and decisions.

The basis of the alleged liability of defendant for the injury suffered by plaintiff was, 1. The claim that the defendant negligently failed to furnish a proper wrench for the tightening of this particular nut, the claim being that a socket wrench, to be used in connection with the monkey wrench, was the only proper and safe appliance for the particular work, and, 2. The claim that defendant was negligent in sending plaintiff, alleged to be an inexperienced minor, without warning, into a place and position of danger. It is earnestly urged that the evidence was insufficient to support a conclusion that there was any negligence in the failure to furnish a socket wrench. We deem it unnecessary to consider this contention in view of the fact that the judgment and order must be reversed for an error occurring at the trial.

It is impossible for us to say upon which theory the jury rendered the verdict against defendant, whether upon the theory that it had failed to use reasonable care in the matter of furnishing a safe and suitable wrench, or upon the theory that it had negligently sent plaintiff, without warning, to work in a dangerous place. It follows that if prejudicial error was committed in regard to the issue relative to the wrench, a reversal must be had.

Plaintiff, in his testimony on direct examination, having spoken of a "stationary wrench" and a "monkey wrench," stated that there was no socket wrench on the premises, and no wrench similar thereto. He then described a socket wrench as being one with six sides and covering the whole of the six-sided nut, whereas the stationary wrench covered only two sides of such nut. This was his only testimony in relation to wrenches on direct examination. On cross-examination he was asked by defendant's counsel: "Well, where did you acquire the information which you gave in response to the questions recently asked you by Mr. Hanlon in reference to stationary wrenches, or socket wrenches?" The plaintiff in answer was proceeding to state that he had been told certain things by one of the men, when he was interrupted by defendant's counsel with a statement that what he was saying was not

an answer to the question and they did not want it. Plaintiff's counsel insisted that the plaintiff be allowed to finish the answer he was giving, and, against the protest of defendant, the witness was allowed to give the following so-called answer: "*I was told by J. H. Lind that if a socket wrench had been used I never would have been hurt.*" Defendant's counsel immediately moved that the answer be stricken out on the ground that it was not responsive to the question, and earnestly and at length set forth the reasons in support of the motion, but the trial court denied the motion and allowed the answer to stand. It was subsequently made by plaintiff to appear that J. H. Lind was an employee of defendant at the mine who had charge of a part of the machinery, and who, presumably, had considerable knowledge concerning the matter under inquiry. There was thus placed before the jury as proper evidence for their consideration in determining the cause of the accident and the question of defendant's negligence, the extra-judicial statement of a man whose opinion was apparently entitled to some weight, as to the exact cause of the accident. That statement was of such a nature as to intimate negligence on the part of defendant in not supplying a socket wrench. It came to the jury without the sanction of an oath and without opportunity to defendant to cross-examine the maker of the statement. We can conceive of no ground upon which the ruling of the court denying the motion to strike out this answer can be sustained. The answer of the witness was wholly and entirely irresponsive and foreign to the question asked. The rule that where a portion of the testimony is unobjectionable the party moving to strike out must designate with precision the particular portion challenged, relied on by plaintiff's counsel, of course has no application where the whole answer is subject to the objection made. Counsel for plaintiff makes a futile attempt to show that a portion of the answer here—namely,—"I was told by J. H. Lind,"—was responsive. But these words cannot be thus separated from the remainder of the answer, for to so separate them would be to make them express something not within the meaning of any part of the answer. No part of the answer as given, when considered as a whole, stated that the witness had received any information on the matters concerning which he had testified on direct examination from J. H. Lind. The answer of the witness can-

not thus be mutilated and distorted from its original meaning. It was an answer expressive of a single thought, absolutely foreign to any matter embraced in the question asked by counsel for defendant. It is not material that the so-called answer was given to a question asked by the counsel for defendant on cross-examination. "While the rule may be somewhat stringent as to concluding a party by the answers of his own witnesses in general response to a question, or binding him by irrelevant answers to irrelevant questions, still it never has been held, or should be, that a party is bound by the irresponsible answers of his adversary's witnesses, and we cannot understand why it should seriously be contended for." (*Estate of McKenna*, 143 Cal. 580, 587, [77 Pac. 461].) It is idle to urge that the answer was entirely harmless. There is no warrant in the record for any such conclusion on our part. It was by no means a self-evident proposition, as suggested by counsel for plaintiff, that the accident was due to the failure to use a socket wrench instead of a spanner or stationary wrench. The claim of plaintiff's counsel that there was testimony to the same effect given by defendant's witnesses is not well founded. It is impossible for us to say what weight and influence this improper evidence of plaintiff had on the minds of the jury in determining the question of defendant's liability. The error of the trial court must be held prejudicial. (*Short v. Frink*, 151 Cal. 83, [90 Pac. 202], and cases there cited.)

The trial court, at the request of plaintiff, gave to the jury a number of instructions in each of which the court explicitly directed them to find a verdict for plaintiff, or explicitly declared plaintiff to be entitled to a verdict, in the event that they found certain things specified therein to be true. Any such instructions should, of course, embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion contained therein that plaintiff is entitled to a verdict. (See *Killelea v. California etc. Co.*, 140 Cal. 604, [74 Pac. 157].) The following are fair samples of these instructions:—

Plaintiff's Instruction No. 8.

"I instruct you, gentlemen, that the parties have in their pleadings here admitted that it was the defendant corpora-

tion's duty, and its own personal duty, to furnish and supply a fit engine, keep it in repair, and to supply a sufficient number of wrenches, and to discard old ones, and to supply new and fit ones of each kind, and to test and inspect said wrenches, and to put each in safe condition before use. Now, I instruct you that if you find that the company and that Maguire, its foreman, *failed to furnish or supply a suitable, fit and proper wrench on March 13th, 1903*, and that the said Mills was obliged to use the wrench he actually did use to turn the engine nut, and that Stanley Sterne was injured by the flying off of the said wrench from the engine nut, he, Stanley Sterne, and his fellow servants not being guilty of contributory negligence, but acting in the scope of his duty as directed by said Maguire (if said Maguire gave any directions) then *I instruct you, gentlemen of the jury, that you must return a verdict here into this court in favor of the plaintiff and against the defendant corporation herein.*"

Plaintiff's Instruction No. 9 so far as material:

" . . . If you find that the defendant and Maguire, its foreman, *failed to furnish a suitable wrench for Mr. Mills to use in tightening the engine nut on March 13th, 1903*, and that owing to the unfitness of the wrench that was used by Mills at the time, the injury was caused to plaintiff, without any contributory negligence on plaintiff's part or on the part of any of his fellow servants, then I instruct you that the injury was caused by the defendant's fault and neglect of duty and that the verdict of this jury should be brought in here in favor of Stanley Sterne, the plaintiff, and against the corporation defendant."

It is unnecessary to further consider these instructions than to point out that they were erroneous in that they made the question of defendant's negligence to turn on the conclusion of the jury as to whether or not the spanner or stationary wrench furnished and used was in fact a suitable wrench for the work as it was then being done with the machinery in motion, without regard to whether or not there had been any want of ordinary care on the part of the defendant, or its personal representative Maguire, in failing to furnish a socket wrench. It was essential to the existence of negligence on the part of the defendant in the matter, not only that the ap-

pliance was in fact not a safe appliance for the work, but also that the defendant or its representative Maguire knew, or ought in the exercise of reasonable care for the safety of its employees to have known, that the wrenches furnished were not safe and sufficient. (See *Malone v. Hawley*, 46 Cal. 409.) The obligation of an employer in such matters is simply to use reasonable care, that degree of care, as was said by Judge Lurton in a decision of the United States circuit court of appeals, "which a man of ordinary prudence in the same line of business would be expected to exercise to secure his own safety were he doing the work." (*Westinghouse etc. Co. v. Heimlich*, 127 Fed. 94. See, also, *Dolan v. Sierra Ry. Co.*, 135 Cal. 436, [67 Pac. 686].) As we have already intimated, there is nothing in the condition of the pleadings in this case to enhance this obligation. Even if it was made to appear here that a socket wrench would have been a safer appliance to use under the conditions of the particular work in hand, there was ample evidence to justify a conclusion that there was in the failure to furnish a socket wrench no want of reasonable care on the part of defendant, or its representative, Maguire—that a reasonably careful man, as solicitous for the safety of his employees as he would be for his own safety, would have considered the wrenches furnished entirely safe and adequate for all work to be done by the employees—that such wrenches so furnished were such as experience sanctioned as reasonably safe. This element was entirely omitted from these instructions, and the trial jurors were thus explicitly instructed that if, from the evidence given on the trial, they believed that the wrenches furnished were not in fact "suitable, fit and proper," they must find defendant guilty of negligence. Because of our conclusion that the judgment and order must be reversed for the error first discussed, it is unnecessary to determine whether error in these instructions can properly be held to have been without prejudice to defendant's cause in view of other instructions given by the court relative to the same subject, and we have discussed the matter solely for the purposes of a new trial.

It is unnecessary to discuss any of the other points presented.

The judgment and order denying a new trial are reversed.

Shaw, J., and Sloss, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank, and filed the following opinion thereon on the eighth day of June, 1908:—

BEATTY, C. J., dissenting.—I dissent from the order denying a rehearing upon the ground that the error of the superior court was, in view of all the evidence in the case, without prejudice. The answer of plaintiff which the court refused to strike out meant nothing more than that a socket wrench would not have slipped, and, as to that, there was no controversy. One of the defendant's witnesses testified to the same effect.

[S. F. No. 4530. Department One.—May 11, 1908.]

CARL AUGUST NILSON, Appellant, v. ANTONIO A. SARMENT, Respondent.

HUSBAND AND WIFE—TITLE IN WIFE—CONSTRUCTION OF CODE—PRESUMPTION—AMENDMENT NOT RETROACTIVE—COMMUNITY PROPERTY.

—The amendment to section 164 of the Civil Code in 1889, creating a presumption in favor of separate property where title is taken in the wife's name, is not retroactive; and where the deed was taken in the wife's name prior to that amendment the presumption is that she held it as community property, and the deed alone cannot show the contrary.

ID.—SEPARATE PROPERTY OF WIFE.—In such case, in order to constitute the property so taken in her name the separate property of the wife, it must be shown either that it was purchased with her separate funds, or that it was given to her by the husband.

ID.—GIFT BY HUSBAND—FINDING AGAINST EVIDENCE.—Where the court found upon sufficient evidence that the property lived upon by husband and family and taken in the wife's name, was acquired with community funds paid for by the husband; but further finds that the property was given to her by the husband, the latter finding must be deemed against the evidence where the husband, without conflict, testified that he bought it for a home, and did not intend to make a gift thereof to the wife, and no circumstances appear sufficient to justify the inference that it was her separate property, or to overcome the presumption that it was community property.

ID.—CIRCUMSTANCES NOT OVERCOMING PRESUMPTION.—The circumstances that the deed described the land as encumbered by a mortgage, to be paid by the grantee, where it was in fact fully paid by the husband with community funds, and that the property was insured in the wife's name, and the loss was made payable to her, and that deeds of trust were executed by husband and wife to secure loans, with a proviso for re-conveyance to the wife, were none of them sufficient to overcome the presumption that the record title left in the wife's name, was community property.

ID.—EFFECT OF INSURANCE IN WIFE'S NAME.—Where the house and lot standing in the wife's name was not her separate property, the assumption that the insurance money was payable to her in the event of loss by fire, would not make the money her separate property, any more than the burnt house was such.

ID.—TERMINATION OF DEEDS OF TRUST.—The provision for reconveyance, or any reconveyance actually made, could have no legal effect otherwise than to make the record title clear, since upon payment of the debt, the purposes of the trust ceased and the property at once, without a reconveyance, reverted in the party or parties who had owned it before. The record title left in the wife, is no evidence that she held it otherwise than as community property.

ID.—CLAIM OF SEPARATE PROPERTY BY WIFE—PURPOSE OF SALE—OBJECTION BY HUSBAND.—The claim by the wife that the property was hers, and that she was about to sell it, and the objection of the husband that she could not sell it unless he signed the deed, cannot be construed as an admission on his part that the land was her separate property, or that she had the right to sell it.

ID.—HUSBAND NOT ESTOPPED AGAINST WIFE'S GRANTEE—PROVISION FOR SURPLUS ON SALE BY TRUSTEE.—The husband is not estopped as against the grantee of the wife by a mere provision in the deeds of trust that in case of sale by the trustees, the surplus, if any, should be paid to the wife, from claiming the property as community property against such grantee, where the latter knew that his grantor was a married woman and was bound to ascertain, at his peril, whether the property was community property, and he did not rely upon any statement made by the husband, but relied upon the wife's warranty of title in her deed, it being matter of common knowledge that such deeds are unusual in this state.

APPEAL from a judgment of the Superior Court of Alameda County and from an order denying a new trial. John Ellsworth, Judge.

The facts are stated in the opinion of the court.

Fred L. Stewart, and C. E. Arnold, for Appellant.

Sam Bell McKee, and F. L. DeFreitas, for Respondent.

SLOSS, J.—This is an action to quiet title to a parcel of land in the city of Oakland. The complaint alleges that plaintiff and Emma Christina Nilson were married in 1877, and ever since have been husband and wife; that in July, 1884, plaintiff purchased the land in question from one John Ziegenbein; that the deed from Ziegenbein named Emma Christina Nilson as sole grantee, but that the whole consideration for the conveyance was paid by plaintiff out of moneys earned by him during his marriage, and that the deed was taken in the name of Emma Christina Nilson, as grantee, for the marital community of plaintiff and his said wife. It is further alleged that in January, 1905, Emma Christina Nilson executed and delivered to defendant an instrument purporting to convey said land to him, and that defendant claims an interest in the land by virtue of said instrument.

The answer alleges that Emma Christina Nilson purchased the property with her separate funds, that the deed to her was made with plaintiff's consent, and that plaintiff, at the time of the purchase from Ziegenbein, gave to his wife whatever interest he had in the property. It is further averred that Emma Christina Nilson entered into the possession and retained possession of the property until her deed to defendant; that during all that time she, with plaintiff's knowledge, approval, and consent, asserted her separate ownership of the land and dealt with it as her separate property; that she insured the building on the land, and had the loss mentioned in the policies made payable to her, and that, on various occasions, she borrowed money, giving as security therefor deeds of trust executed by herself and the plaintiff, such deeds of trust providing that, in the event of payment, the property should be reconveyed to her, and in case of default and sale, any surplus of the proceeds should be paid to her. The defendant alleges that the plaintiff's wife represented to him that the property was her separate property, that he caused the title to be searched and was advised that the title was in her, and upon careful inquiry as to the ownership, learned that she had, with plaintiff's consent, claimed the property as her own and dealt with it as her separate property; whereupon

the defendant purchased it of her, paying her the sum of two thousand three hundred dollars. The defendant also filed a cross-complaint, asking judgment for the possession of the property and damages for its withholding.

The court found against plaintiff's allegation that the land was, or ever had been, the community property of himself and his wife. It found that the whole consideration was paid by plaintiff out of moneys earned by him during his marriage with his said wife, but that plaintiff directed Ziegenbein to execute the deed to Emma Christina Nilson and gave to her whatever interest he had in said property. Judgment in favor of defendant, quieting his title against plaintiff and awarding him the possession of the premises, together with the value of their use and occupation, followed. The plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The principal point urged by appellant is that the evidence is insufficient to justify the finding that the property was not community property but that it was separate property of plaintiff's wife. Sections 162 and 163 of the Civil Code define the separate property of the spouses as that owned by them, respectively, before marriage, and that acquired afterward by gift, bequest, devise, or descent. By section 164 all other property acquired after marriage by husband or wife, or both, is declared to be community property. In 1889 this section was amended by the addition of the words, "but whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property." Prior to the adoption of this amendment the presumption was just the opposite; that is to say, property conveyed to either husband or wife after their marriage by a conveyance (other than a deed of gift) was presumed to have vested the title in the marital community. (*Tolman v. Smith*, 85 Cal. 280, [24 Pac. 743]; *Smith v. Smith*, 12 Cal. 224, [73 Am. Dec. 533]; *Meyer v. Kinzer*, 12 Cal. 247, [73 Am. Dec. 538]; *Ramsdell v. Fuller*, 28 Cal. 38, [87 Am. Dec. 103]; *Morgan v. Lones*, 78 Cal. 58, [20 Pac. 248]; *Jordan v. Fay*, 98 Cal. 264, [33 Pac. 95]; *Gwynn v. Dierssen*, 101 Cal. 563, [36 Pac. 103]; *Lewis v. Burns*, 122 Cal. 358, [55 Pac. 132].) The property in question was acquired by the Nilsons (or one of them) in 1884. It.

is thoroughly settled that the amendment of 1889 is not retroactive and has no application to property acquired by husband or wife before its enactment. (*Jordan v. Fay*, 98 Cal. 264, [33 Pac. 95]; *Gwynn v. Dierssen*, 101 Cal. 563, [36 Pac. 103]; *Lewis v. Burns*, 122 Cal. 358, [55 Pac. 132].) In *Jordan v. Fay* the court, speaking of this amendment, said: "But the rule declared by the statute was more than a rule of evidence; it was a rule of property as well; and we do not think the legislature intended or had the power to change it so that it would be retroactive in effect and disturb titles already vested."

Was the finding as to the separate character of the property in question supported by any substantial evidence tending to overthrow the presumption resulting from the conveyance to a married person? To make the land the separate property of the wife, it was necessary, either that it should have been acquired with her separate funds or that it should have been given to her. It is to be remembered that the court finds, contrary to the averment of the answer, that the property was paid for with the community funds, and the conclusion that it became the separate property of the wife must, therefore, rest upon the further finding that plaintiff gave to his wife whatever interest he had in said property. There is nothing in the evidence before the court to show that any such gift was ever made. It appears that plaintiff's wife left his home about the time she made her deed to defendant, and she was not a witness at the trial. Nor was any testimony given by Ziegenbein, the original grantor. The only witnesses who could give direct testimony regarding the circumstances surrounding the making of the deed in 1884 were the plaintiff and his brother. Both testified that the deed was made to run to Emma Christina Nilson at the suggestion of Ziegenbein, who said that "it would make no difference," and that neither she nor the plaintiff could sell the land without the signature of the other. This explanation, which is not in itself improbable, was not contradicted, but, even if we disregard it, we are left with the deed itself, which, if unexplained, raises the presumption that the land became community property, notwithstanding the fact that the wife was named as grantee. The plaintiff testified that he bought the property for a home for himself and his family, and that it was not his

intention to make a gift of it to his wife. This clear and positive testimony regarding the transaction is not directly contradicted, and there is no support for the finding against it unless it can be found in some circumstances which are claimed to justify the inference that the land became the separate property of the wife.

Much stress is laid on the fact that Ziegenbein's conveyance described the land as "encumbered by a mortgage . . . on which there is now due the sum of \$2900 to be paid by the party of the second part." The party of the second part was the wife, and it is argued that this shows that the wife became bound to pay the mortgage, and thus tends to support the contention that the husband intended to make the property hers. It appears, however, that the entire purchase price was only two thousand nine hundred dollars. Nothing was to be paid over and above the face of the mortgage, and in fact one thousand two hundred dollars of this had been paid by plaintiff before he ever received the deed. The most that can be claimed for the clause quoted is that it shows that the consideration was to be paid by the wife from her separate property. In view of the uncontradicted evidence that no part of the consideration was so paid, but that the plaintiff paid part of it before the execution of the deed, and eventually paid it all with community property (as is found by the court), the insertion of this clause by the grantor cannot be regarded as supporting the finding that the land was the separate property of the wife. It certainly does not tend to show a gift, which alone can be contended for under the findings.

No greater force is to be attributed to the evidence that insurance was affected by the plaintiff, and that by the policies the loss was made payable to the wife. In view of the fact that the title stood of record in her name, this was the natural and ordinary course to pursue. If the house and lot, although standing in her name, were not her separate property, the circumstance that insurance money would have been payable to her in the event of loss by fire would not make that money her separate property any more than the burnt house was. In *Lewis v. Burns*, assessment-lists, assessing certain lots to the wife, were sworn to by the husband. This was held not to be an admission that they were her separate property. The method of insuring in this case stands on the same ground.

The same reasoning applies to the deeds of trust made by plaintiff and his wife to secure loans of money. The provision for reconveyance, or any reconveyance actually made, had no legal effect beyond that of making the record title clear, since, upon payment of the debt, the purposes of the trust ceased, and the property at once, without any reconveyance, reverted in the party or parties who had owned it before. (*Tyler v. Currier*, 147 Cal. 31, [81 Pac. 319]; *MacLeod v. Moran*, (Cal.) 94 Pac. 604.) The provisions for reconveyance or payment of surplus, contained in these deeds of trust, like the mode of effecting insurance, merely indicated that it was not desired to change the record title. That title was in the wife, but these instruments are no evidence that she held it, or that her husband recognized her as holding it, as separate rather than as community property.

The only other circumstance relied on by respondent is that the wife claimed the land as her separate property. Her claims are, of course, in no way binding on the plaintiff except in so far as they may have been made with his knowledge and assented to by him. All that appears in this connection is that plaintiff's wife told him several times within a year or two before her sale to defendant that she would like, or was about to sell the property, to which he had objected, saying that she could not sell it unless he signed the deed. This cannot be construed as an admission on his part that the land was her separate property or that she had the right to sell it.

It is not questioned that where a husband purchases property with community funds, and directs the conveyance to be made to his wife, *with the intent to make it her separate property*, the deed will operate to vest the property in her as her separate estate. (*Peck v. Brummagin*, 31 Cal. 441, [89 Am. Dec. 195]; *Woods v. Whitney*, 42 Cal. 358; *Jackson v. Torrence*, 83 Cal. 521, [23 Pac. 695].) But to have that effect, there must, in the case of a deed executed before the amendment of 1889, have been something more than the mere fact that the wife was named as grantee. There must be something, appearing either in the deed or elsewhere, to show an intent to make the property the separate estate of the wife. Here we find that the plaintiff, desiring to purchase a home for himself and his family, bought the land in question, there being a house upon it; that, at the suggestion of the vendor

he took the deed in the name of his wife; that, with his family, he occupied the premises as his home continuously from the time of the purchase; that he paid, out of his earnings, the purchase price of the property, the premiums on insurance, and all loans secured by the property. He testifies that he never intended to make a gift to his wife. His dealings with the property were such as would, in the ordinary course of business be dictated by the fact that the record title stood in his wife's name, and were in no way inconsistent with the community character of the property. There is no substantial evidence tending to show that he made a gift to his wife of his interest in the property, and the presumption that it was community property, aided, as it was, by the undisputed testimony of a party to the transaction, cannot, therefore, be said to have been overthrown.

It is urged that plaintiff is estopped, as against defendant, to show that the property is community property. This contention is based in part on the provision in the deeds of trust that in case of sale, the surplus, if any, should be paid to the wife. Such provision was said, in *Hoeck v. Grief*, 142 Cal. 119, [75 Pac. 670], to constitute an estoppel in favor of the wife. But this declaration was not necessary to the decision, and this court, in denying a rehearing in *Tyler v. Currier*, 147 Cal. 31, [81 Pac. 318], so stated, adding that in its opinion, what was said in this connection in *Hoeck v. Grief* was "not a correct statement of the law." Indeed, it seems clear that neither the execution of the deed of trust, nor any of the other dealings of plaintiff with the property, should be held to estop him from asserting its character as community property. Apart from other considerations, two essential elements of an estoppel are, 1. That the party asserting it must have been ignorant of the true state of facts and of the means of acquiring knowledge of them, and, 2. That he must have relied upon the statement or admission of the party whom he seeks to bind by such statement or admission. (*Biddle Boggs v. Merced Mining Co.*, 14 Cal. 279.) Neither of these elements existed in this case. The respondent knew from the Ziegenbein deed, which was of record, that his grantor was a woman. He had actual notice that she was a married woman. This was enough to put him on inquiry, and to compel him to ascertain, at his peril, whether the property was

community property. (*Ramsdell v. Fuller*, 28 Cal. 44, [87 Am. Dec. 103]; *McComb v. Spangler*, 71 Cal. 418, [12 Pac. 347].) Furthermore, plaintiff was actually residing on the property, but defendant, before purchasing, made no inquiry of him as to the state of the title. Nor did the defendant in fact rely upon any supposed admission of plaintiff that the property belonged to his wife in her separate right. He took from Mrs. Nilson a deed containing a covenant of warranty of title. It is a matter of common knowledge that such deeds are unusual in this state. A real estate agent, who represented the defendant in the transaction with Mrs. Nilson, testified that he had drawn the deed and that the reason he had made it in the form of a warranty deed was because Mr. Nilson did not sign it. There could be no stronger proof that the defendant (who was bound by the knowledge and the acts of his agent) knew that Mrs. Nilson had a husband who might have some claim upon the property and that, instead of relying upon any representation that she was the sole owner of the property, he tried to protect himself against a possible claim on the part of her husband by taking a warranty deed. Under these circumstances there is no ground for a claim of estoppel.

It is unnecessary to consider the other points made by appellant.

The judgment and order appealed from are reversed.

Angellotti, J., concurred.

SHAW, J., concurring.—I concur solely because, under the decision in *Tolman v. Smith*, 85 Cal. 280, [24 Pac. 743], and other cases cited in the opinion of Judge Sloss, it had become settled law that the presumption was that property conveyed to the wife with the knowledge and consent of the husband was community property, that the fact that the conveyance was so made to her with his consent did not raise an inference that it was intended by him as a gift to her, or, at all events, that such inference was not sufficient to overcome the said presumption, that this had become a rule of property and that the amendment of 1889 (Stats. 1889, p. 328), to section 164 of the Civil Code, declaring that a conveyance to the wife should be pre-

sumptive evidence that the property conveyed is her separate estate, is not retroactive and does not apply to conveyances previously made. Were it an original question, I should say the rule, prior to the amendment, should have been that such conveyance to the wife with the husband's consent was *prima facie* evidence that he intended the property to be a gift to her, and that the property thereby vested in her as her separate estate, that this was a rule of evidence and that the effect and purpose of the amendment of 1889 was to declare the correct rule of evidence and abrogate the false rule previously followed by the courts, and, hence, that said amendment was applicable to prior transactions and was so intended. If the law had not thus been settled it seems clear that the natural inference that a gift was intended, arising from the conveyance to the wife in this case, would be presumptive evidence thereof and would support the conclusion of the trial court, notwithstanding the testimony of the husband, manifestly to his interest, that it was not so intended.

[S. F. No. 4511. Department One.—May 11, 1908.]

AMERICAN DE FOREST WIRELESS TELEGRAPH
COMPANY, Petitioner, v. SUPERIOR COURT OF THE
CITY AND COUNTY OF SAN FRANCISCO, and
HON. J. C. B. HEBBARD, Judge.

FOREIGN CORPORATION IS PERSON WITHIN MEANING OF FOURTEENTH AMENDMENT.—A corporation, although organized under the laws of another state, is a "person" within the meaning of the fourteenth amendment of the constitution of the United States, providing that no state shall deprive any person of property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

ID.—STATUTE CURTAILING RIGHT TO MAINTAIN OR DEFEND ACTIONS—CONSTRUCTION.—A statute which purports to curtail the privilege of foreign corporations to maintain or defend actions in this state, and to impose conditions upon compliance with which alone they may be permitted to do so, will not be construed to extend beyond the plain meaning of its terms considered in connection with its object and purposes.

ID.—STATUTE PROHIBITING MAINTENANCE OF ACTION—RIGHT TO DEFEND NOT AFFECTED—FAILURE TO FILE COPY OF ARTICLES OF INCORPORATION—CONSTITUTIONAL LAW.—Section 410 of the Civil Code, providing that no foreign corporation doing business in this state, which fails to file copies of its articles of incorporation with the secretary of state, and with the county clerk of the county where its principal place of business is located and where it owns property, as required by section 408 of such code, "can maintain any suit or action in any of the courts of this state until it has complied with said section," does not forbid a foreign corporation which has failed to comply with such provisions from defending an action brought against it in the courts of this state. Notwithstanding the provisions of those sections, to prevent such a foreign corporation from defending any action brought against it, would be to deny it the equal protection of the laws and to deprive it of its property without due process of law.

ID.—FAILURE TO DESIGNATE PERSON FOR SERVICE OF PROCESS.—Where it appears from the record that a judgment against a foreign corporation was rendered upon its default after striking out its answer, solely for the reason that it had failed to file certified copies of its articles of incorporation as required by sections 408 and 410 of the Civil Code, the action of the court cannot be sustained by reason of the provisions of sections 405 and 406 of that Code, which purport to declare that a foreign corporation doing business in this state, which neglects to file in the office of the secretary of state a designation of some person residing within the state upon whom process may be served, cannot maintain or defend any action or proceeding in the state courts until it has filed such designation.

APPLICATION for a Writ of Certiorari to amend a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

C. M. Fickert, for Petitioner.

G. H. Perry, for Respondent.

SHAW, J.—This is a proceeding in *certiorari* to review a judgment of the superior court of the city and county of San Francisco for the sum of \$257.75 and costs, in favor of the San Francisco Commercial Agency, a corporation. The action in which the judgment was rendered was originally begun in the justices' court and the judgment sought to be reviewed was rendered in the superior court on appeal.

The defendant in the action, petitioner here, is a corporation organized under the laws of the state of New Jersey. The complaint stated a cause of action to recover money due on contract. Summons was duly issued and the defendant appeared and filed an answer. The plaintiff therein then moved the court to strike the answer from the files, the motion was granted, and thereupon judgment was given in favor of the plaintiff therein against the petitioner as above mentioned. The motion to strike the answer from the files was made upon the ground that the defendant was a corporation of another state; that the demand sued on arose out of business transactions in this state and that said defendant corporation had failed and neglected to comply with the statute of this state requiring a foreign corporation doing business in this state to file a certified copy of its articles of incorporation with the secretary of state. No other ground was assigned as cause for the motion, and it appears to have been granted upon the ground that a corporation so failing cannot be allowed to defend an action brought against it in the courts of this state.

The statutory provisions in question are found in sections 408 and 410 of the Civil Code. Section 408 provides that "Every corporation organized under the laws of another state, territory, or of a foreign country, . . . which shall hereafter do business in this state or maintain an office herein, or which shall enter this state for the purpose of doing business herein, must file in the office of the secretary of state of the state of California a certified copy of its articles of incorporation, . . . and a certified copy thereof, duly certified by the secretary of state of this state, in the office of the county clerk of the county where its principal place of business is located, and also where such corporation owns property." Section 410 declares that "No foreign corporation which shall fail to comply with section four hundred and eight . . . of this code can maintain any suit or action in any of the courts of this state until it has complied with said section."

It will not be disputed that a corporation, although organized under the laws of another state is a "person" within the meaning of the fourteenth amendment of the constitution of the United States providing that no state shall deprive any person of property without due process of law, nor deny any person within its jurisdiction the equal protection of the

laws. (*Gulf etc. Ry. v. Ellis*, 165 U. S. 154, [17 Sup. Ct. 255]; *Railway Tax Cases*, 118 U. S. 396, [6 Sup. Ct. 1132].) It may also be conceded, as contended by counsel for respondent, that foreign corporations have no legal existence beyond the bounds of the state or sovereignty by which they are created and can exercise none of the functions and privileges conferred by their charters in any other state or country except by comity and consent of the latter (19 Cyc. 1222), and that one of the privileges which a corporation receives by its charter is the privilege of maintaining or defending actions in its corporate name and as a body corporate; in other words, the privilege of being a "person" within the cognizance of the law. There is, however, no rule of the common law which forbids a corporation organized and empowered to do business in one state from doing such business in another state. In the absence of any statutory inhibition there can be no doubt that the general comity existing between the states would permit a foreign corporation which had entered this state and had done business therein to maintain and defend actions arising out of such business. (19 Cyc. 1211, 1212.) A statute of this state which purports to curtail the privilege of foreign corporations to maintain or defend actions in this state, and to impose conditions upon compliance with which alone they may be permitted to do so, will not be construed to extend beyond the plain meaning of its terms considered in connection with its object and purposes. The sections above quoted do not purport to forbid a foreign corporation which has failed to comply with its provisions from defending an action brought against it in the courts of this state. They are only forbidden to *maintain* actions. The order of the court, striking out the answer because of the failure of the defendant to comply with the provisions of section 408, was not authorized by the statute. Notwithstanding the provisions of that section and of section 410 imposing a penalty for violation thereof, the foreign corporation doing business in this state was entitled to defend any action brought against it. To prevent it from doing so would be to deny it the equal protection of the laws and to deprive it of its property without due process of law. It appearing from the record that the judgment was rendered upon default and that the default was entered for this cause alone, it follows that the judgment is void.

Sections 405 and 406 of the Civil Code purport to declare that any corporation of another state doing business within this state must file in the office of the secretary of state a designation of some person residing within the state who may be served with process issued in this state against such corporation, and that such foreign corporation cannot *maintain or defend* any action or proceeding in any court of this state until it has complied with this provision. The motion in the case before us was not based upon the ground that the corporation had failed to comply with this provision, and, hence, no authority for the action taken can be predicated upon this statute.

It is ordered that the judgment of the superior court in the action above mentioned, and the order striking out the answer therein, be annulled and that the petitioner be allowed to defend the said action.

Angellotti, J., and Sloss, J., concurred.

[S. F. No. 4793. Department One.—May 12, 1908.]

In the Matter of the Guardianship of JOSEPH WESTWOOD BAKER, a Minor. PAGE E. T. BAKER, Appellant.

GUARDIAN AND WARD—TESTAMENTARY GUARDIAN—CONSENT OF MOTHER TO APPOINTMENT BY FATHER.—Under section 241 of the Civil Code providing that "A guardian of the person or estate, or of both, of a child born, or likely to be born, may be appointed by will or by deed, to take effect upon the death of the parent appointing: 1. If the child be legitimate, by the father, with the written consent of the mother,"—the consent of the mother to a guardian appointed by the will of the father may be given after the death of the father.

ID.—RESIDENCE OF MINOR—CONCLUSIVENESS OF FINDING—FRAUD OR MISTAKE.—In a proceeding for the appointment of the guardian of a minor, a finding that the minor was a resident of the county in which the proceeding was instituted is of a jurisdictional fact and is conclusive, in the absence of fraud or mistake.

ID.—VACATING ORDER OF APPOINTMENT—FINDING—APPEAL—SPECIFICATION OF PARTICULARS.—In a proceeding to set aside an order ap-

pointing a guardian of a minor, on the ground of fraudulent representations as to his residence, a finding negating the allegations of fraud will not be reviewed on an appeal from an order refusing to vacate the appointment, when the bill of exceptions contains no specifications of the particulars wherein the evidence is insufficient to justify the finding.

APPEAL from an order of the Superior Court of Fresno County refusing to revoke letters of guardianship. George E. Church, Judge.

The facts are stated in the opinion of the court.

W. T. Kearney, for Appellant.

M. K. Harris, for Respondent.

SHAW, J.—This is an appeal from an order refusing to revoke letters of guardianship and set aside an order fixing the amount of guardian's bond. It involves the validity of the appointment and qualification of a testamentary guardian.

The ward is the son of the appellant and her former husband, Westwood J. Baker. The parents were divorced on April 1, 1898, and thereafter lived apart, the father residing in Fresno County and the mother in San Francisco. The father died on July 4, 1905, leaving a considerable estate, which he disposed of by will. The will, which was admitted to probate on August 14, 1905, in the superior court of Fresno County, contained this provision: "I hereby appoint L. O. Stephens of the city of Fresno, guardian of the person and estate of my said son Joseph Westwood Baker." The estate of the child consisted entirely of property held in trust by the said Stephens, part of it derived from the father, which part was to remain in trust until the child became twenty-five years of age, and the remainder by devise from one Sarah W. Garrett to remain in trust until he was of age. All of it was situated in Fresno County and a considerable portion of it was real estate. The fact that the will purported to appoint Stephens the guardian of her son coming to the knowledge of the appellant, she employed an attorney in Fresno to represent her in the matter and instructed him that she desired to retain the custody and guardianship of the person of her

son. Thereupon it was agreed between her attorney and the attorney for Stephens that Stephens should waive the guardianship of the person and yield to her the custody and control of the child, but that he should be the guardian of the estate. Stephens then filed his application in the superior court of Fresno County, reciting the testamentary appointment aforesaid, and declining the guardianship of the person of the child, alleging that the minor was a resident of Fresno County, and asking the court to fix the amount of his bond as guardian and trustee of said estate, and to direct the clerk to issue letters of guardianship to him. The court made an order that this application be heard on September 11, 1905. This application and order were served on the appellant's attorney and by him delivered to her. She then signed and filed a writing as follows: "I hereby consent and agree that L. O. Stephens may be the trustee and guardian of the estate of said minor, but not of his person." Upon the hearing the court made an order fixing the amount of bond of Stephens as guardian and trustee and directing the issuance of letters of guardianship of the estate to him. Stephens filed the required bond, took the oath, and received the letters accordingly. Afterwards, on March 8, 1906, the mother filed in the said court a petition to revoke the order and the letters so issued and to dismiss the guardianship proceedings. The appeal is from the order denying this petition.

The provision of the statute, applicable herein, relating to testamentary guardians are as follows:—

"A guardian of the person or estate, or of both, of a child born, or likely to be born, may be appointed by will or by deed, to take effect upon the death of the parent appointing: 1. If the child be legitimate, by the father, with the written consent of the mother; or by either parent, if the other be dead or incapable of consent; 2. If the child be illegitimate, by the mother." (Civ. Code, sec. 241.)

"The superior court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who have no guardian legally appointed by will or deed, and who are inhabitants or residents of the county, or who reside without the state and have estate within the county." (Code Civ. Proc., sec. 1747.)

"Every testamentary guardian must qualify and has the same powers and must perform the same duties with regard to the person and estate of his ward as guardians appointed by the court, except so far as his powers and duties are legally modified, enlarged, or changed by the will by which such guardian was appointed, and except that such guardian need not give bond unless directed to do so by the court from which the letters of guardianship issue." (Code Civ. Proc., sec. 1758.)

The appellant contends that the testamentary appointment of Stephens was ineffectual because she did not consent thereto during the lifetime of the father, and that the proceedings in the superior court of Fresno County are void, for the reason, as alleged, that the minor was not at that time or afterwards, a resident or inhabitant of Fresno County, but lived and resided in San Francisco, and that therefore the superior court of Fresno County was without jurisdiction.

A deed may be made, to take effect immediately upon its execution, or, within certain limitations, at any time afterwards, even after the death of the grantor. A will can have no effect whatever until the testator is dead. Hence it is probable that the phrase "to take effect upon the death of the parent appointing," added as a qualification to the introductory paragraph of section 241 of the Civil Code, was intended to refer only to appointments made by deed. We do not, however, regard this clause as important. By the first subdivision of the section, the mother's consent in writing is required in all cases, if she is living. This implies that her consent is to be given at some time after the appointment has become otherwise effectual, that is, after the death of the father, since, until that time, it could not be known that she would survive, and it cannot be doubted that an appointment by the father either by will or by deed, to which the mother had not in her lifetime consented, would be effectual without such consent, if he survived her. Her consent is essential only in case she survives. The father's appointment is ineffective before his death, is, in fact, no appointment at all until his death. It is, therefore, only upon his death that her consent becomes of any importance. Furthermore, the will not only does not speak, as it is said, until the death of the testator, but is wholly inoperative before it is probated,

and the appointment of a guardian by will cannot be said to have been made until the validity of the will making it has been thus established. Hence, if she survives, but dies before probate, without executing any consent to the appointment, or making an appointment herself, the father's testamentary appointment would obviously be valid, although not confirmed by the consent of the mother. In view of these contingencies, it is the most reasonable construction of the statute to hold that her consent to a testamentary appointment may be effectually given after the father's death as well as before. There can be no hardship in this result. The appointment, if she survive, is of no effect if she dissent, and by the same subdivision which gives her this power of veto, she being the survivor, may withhold her consent and may appoint whom she chooses, or may herself apply to the court for appointment under section 1747, Code of Civil Procedure. She is then in control of the entire matter. We are therefore of the opinion that the appointment was valid and became effectual upon the death of the father and the subsequent written consent of the mother manifested by the writing above mentioned.

The argument that the superior court of Fresno County was without jurisdiction to make the order directing Stephens to give a bond as testamentary guardian, is based on the assumption that, at the time that order was made and the proceeding therefor instituted, the minor was not a resident of Fresno County. In the original proceeding the petition of Stephens alleged that the minor was then a resident of Fresno County. Upon the hearing of that petition the court found this allegation to be true and so recited in the order directing and fixing the amount of the bond. This finding as to the jurisdictional fact is conclusive unless it was obtained by fraud or mistake. In the present proceeding to set aside that order there is an attempt to allege that this finding as to the residence of the minor was obtained by fraud upon the court and upon the present petitioner, Page E. T. Baker, the mother of the minor. The court finds that this allegation is untrue and that there was no fraud in obtaining the former order. It is contended that this finding is contrary to the evidence. The record before us, however, does not enable us to review the finding of the court below on that subject and it is there-

fore conclusive. The bill of exceptions contains no specifications of particulars wherein the evidence is insufficient to justify the findings. Such specification is necessary in order to authorize this court to review the evidence and consider its sufficiency to support the order. (Code Civ. Proc., sec. 648; *Winterburn v. Chambers*, 91 Cal. 185, [27 Pac. 658]; *Meades v. Lazar*, 92 Cal. 227, [28 Pac. 935]; *Estate of Depeaux*, 118 Cal. 290, [50 Pac. 387]; *Estate of Behrens*, 130 Cal. 418, [62 Pac. 603].) The finding is therefore conclusive as to the residence of the minor and establishes jurisdiction upon any theory of the law as to the place of jurisdiction. Section 1758, Code of Civil Procedure, which authorizes the court to make the order in question is silent as to the county in which the proceeding must be instituted. Whether jurisdiction would lie in the county where the minor resided, the county where the will was probated, the county where the property was situated, the county where the guardian resided, or in that one of these counties first acquiring jurisdiction, or whether section 1747, providing by its terms only for jurisdiction in cases of guardians appointed by the court (*Estate of Taylor*, 131 Cal. 180, [63 Pac. 345]), can be construed to apply to testamentary guardians and place the jurisdiction in the county where the minor resides or is an inhabitant, are questions not here presented, since Fresno County upon the record before us, answers to all the descriptions. We express no opinion upon the subject.

In view of the conclusions we have reached upon the merits we think that the alleged errors of law occurring at the trial and so very briefly discussed by counsel are unimportant. It is unnecessary to consider them.

There are some indications that this petition was intended as an application, under section 473 of the Code of Civil Procedure, to set aside the previous order as a proceeding taken against the appellant through her surprise, inadvertence, and excusable neglect. Although there is no specification of the insufficiency of the evidence, we have examined the bill of exceptions on this point, and find the evidence wholly insufficient to establish any abuse of discretion on the part of the court below in denying her application, or to show that she was not fully advised of the facts and of her rights, assuming the application to be for relief under that section.

The order appealed from is affirmed.

Angellotti, J., and Sloss, J., concurred.

Hearing in Bank denied.

[L. A. No. 2015. In Bank.—May 12, 1908.]

**F. E. HASKELL, and R. SMITH, Appellants, v. CITY OF
LONG BEACH et al., Respondents.**

**MUNICIPAL CORPORATIONS—ELECTION TO ANNEX TERRITORY—MARKING OF
BALLOTS—GENERAL ELECTION LAW.**—Under the statute of 1889,
as amended in 1905, providing for the annexation of territory to
incorporated cities and towns, and for the holding of a special
election for that purpose, and making the general law applicable,
so far as may be practicable, to the ballots used at such election,
the opening and closing the polls and the holding and conducting
of such election, the counting of ballots, and making of returns
by the election board, is not intended to make the general law
applicable to the mode of marking the ballots so as to indicate
the intention of the voters as to the proposition submitted to them
for or against annexation, and they may express such intention by
marking the ballot in any manner which will indicate it.

ID.—DIRECTION IN NOTICE OF ELECTION NOT MANDATORY.—A direction
in the notice of election that, "to vote, stamp the cross in the
voting square," etc., is directory merely, and non-compliance there-
with will not invalidate a ballot so long as it appears from any
mode of stamping the ballot that the voter has indicated his choice
to vote for or against annexation.

ID.—DISTINGUISHING MARK.—The failure to stamp the cross in the vot-
ing square, and the stamping of the same anywhere between the
parallel lines indicating "For Annexation" or "Against Annexation"
does not make the cross a "distinguishing mark."

ID.—LIBERAL CONSTRUCTION OF BALLOT—EFFECTIVENESS.—The ballot
should be liberally construed, and the intendments should be in
favor of a construction which will render the ballot effective, rather
than one which will, on a technical ground, render it ineffective.

APPEAL from a judgment of the Superior Court of Los
Angeles County and from an order denying a new trial.
Walter Bordwell, Judge.

The facts are stated in the opinion of the court.

M. P. Goodrich, City Attorney of San Pedro, J. S. Chapman, and Ward Chapman, for Appellants.

George A. Skinner, City Attorney of Long Beach, and Lawler, Allen, Van Dyke & Jutten, for Respondents.

LORIGAN, J.—Plaintiffs appeal from a judgment in favor of defendants and from an order denying their motion for a new trial.

This action was brought to set aside and annul an attempted annexation by the city of Long Beach of certain territory on Terminal Island, lying between the cities of Long Beach and San Pedro in Los Angeles County. The plaintiffs are residents and taxpayers of the territory sought to be annexed and bring the action on the ground that at a special election held for the purpose of determining whether annexation should be made, such attempted annexation was in fact defeated by a majority vote of the electors in the territory sought to be annexed, and that the finding of the election board of the election precinct embracing that territory, and the finding of the board of trustees of the city of Long Beach, after a canvass of the votes cast, to the contrary, were both void.

The proceedings for the annexation of the territory in question were had under the statute of 1889, as amended in 1905, providing for the alteration of boundaries of, and for the annexation of territory to, incorporate cities and towns (Stats. 1889, p. 358; Stats. 1905, p. 551). There is no question in the case as to the regularity of all the proceedings relative to the special election at which the proposition for the annexation of the territory in question to the city of Long Beach was voted on. In order to affect annexation of outside territory to an incorporated city it is necessary under the statutes above referred to that at a special election held for that purpose there shall be a majority vote in both the municipality and in the territory to be annexed in favor of the proposition of annexation then submitted. The vote in the election precincts embracing the city of Long Beach was largely in favor of the proposition, but it is insisted by ap-

pellants that in reality the proposition was defeated by a majority vote of the electors in the territory sought to be annexed. In the election precinct which embraced that territory there were cast 146 ballots. The election officers of the precinct in the count of the ballots unanimously rejected one ballot as improperly marked, and that this was proper is not questioned. The election board certified that 145 legal votes had been cast, of which there were found 73 in favor of annexation and 72 against it, and that the proposition to annex the territory had been carried by a majority of one and the returns being delivered to the board of trustees of the city of Long Beach were canvassed by that body and the same result declared.

The action of the plaintiffs was based upon a claim that the certificate of the election officers was false; that the officers counted certain ballots which were illegal and void and which should have been rejected; that in fact according to the legal ballots cast the proposition for annexation, instead of being carried by a majority of one had been defeated by just that majority.

Facsimiles of the ballots the legality of which are questioned, are set forth in the record. There are four and their validity or invalidity is the only question in the case which requires consideration. The resolution passed by the board of trustees of the city of Long Beach calling such special election, and the notice of election prescribed the form of ballot to be used with instructions in said notice of election to the voters as follows: "To vote, stamp a cross (X) in the voting square to the right of and opposite the answer you desire to give; all marks except the cross (X) are forbidden; all distinguishing marks or erasures are forbidden and make the ballot void." These instructions were also printed on the ballots which were otherwise similar to that required by section 1197 of the Political Code, and a copy of the form of ballot furnished the voters at their election in question is as follows:—

| | | |
|---|--------------------|--|
| 1 | For Annexation | |
| 2 | Against Annexation | |

Two of the ballots in question had a cross stamped after the words "For Annexation" and one of them had a cross after

the words "Against Annexation," but on each the cross was stamped in the parallelogram to the left of what was intended on the ballot to be the voting square and not in the square itself. The fourth ballot was marked with a cross to the left of the words "For Annexation" and stamped in the square containing the number "1."

The trial court held these four ballots to be legal and to have been properly counted. Appellants contend that this was error and that such ballots should have been rejected.

It is provided by the first section of the act under which these annexation proceedings were had that "such notice" (the published notice of the resolution of intention to hold an annexation election) "shall distinctly state the proposition to be submitted, i. e., that it is proposed to annex to, incorporate in, and make a part of such municipal corporation the territory sought to be annexed, specifically describing the boundaries thereof; and in said notice the qualified electors of said municipal corporation, and the qualified electors residing in said territory so proposed to be annexed, *shall be invited to vote upon such proposition by placing upon their ballots the words 'for annexation' or 'against annexation' or words equivalent thereto.*"

It is further provided in said act that "the ballots used at such election, the opening and closing of the polls, and the holding and conducting of such election shall be in conformity, as far as may be, with the general laws of this state concerning elections"; and further that in counting the ballots and making returns the election board should do so "as nearly as practicable in the manner provided in the election laws of this state."

It is insisted by appellants that under the latter provisions of the act it was intended primarily and unqualifiedly to preserve in such elections all the safeguards minutely provided for in the general election law and to make its provisions applicable; that, under the provisions of that law in order to make a ballot legal and valid, it must be stamped with a cross in the square provided for that purpose; that this provision is mandatory and that as the four ballots in question here, having the cross stamped in places other than the voting square where the mandatory provision of the general election law required them to be, were invalid and should have been rejected.

Conceding, without deciding, this position of appellants to be correct if the validity of ballots cast at an election under the Annexation Act are to be tested by the provisions of the general election law; still it is insisted by respondents that in an election of the kind here involved the electors are not bound by the provisions of the general election law as to how they shall mark their ballots so as to indicate their intention with reference to the proposition of annexation submitted to them; that under the act they are not controlled in their expressions of intention by these provisions of the general election law but may express such intention by marking the ballot in any manner which will indicate such intention on the subject of annexation.

We think this position of respondents is correct. It will be observed that under the provision of the Annexation Act which states how the voter shall be invited to express his choice of the proposition of annexation there is no requirement that that choice shall be indicated in any particular manner. Nor in the provision making the general election law in certain respects applicable to elections held under the act is there any such explicit language used as would indicate that such choice must be made by marking the ballot in the voting square and nowhere else. If it was intended that such law, in this particular, should be applicable to elections under the act, it is only reasonable to assume that the legislature would have so declared. The provision in the act that "the ballots used at the election, the opening and closing of the polls, and the holding and conducting of such election shall be in conformity, *as far as may be*, with the general laws of the state concerning elections" is not an express requirement that the ballots shall be marked in the particular voting square, where under the general election law it is required that the cross shall be placed. The expression used in this particular provision "*as far as may be*" and the expression in the section of the act heretofore referred to relative to the counting of the ballots by the election board and the returns, and requiring that this shall be done "*as far as practicable*" according to the provisions of the general election law indicates that some relaxation of the requirements of that general law as to all these matters was permitted. Of course, these expressions, on account of their indefiniteness, render it very difficult to

determine just to what extent it was intended that the provisions should be relaxed, but we think that the expression "as far as may be" found in the provision in reference to the ballots and the holding and conducting of the election, was used in view of the fact that the prior provision of the act relative to the method in which the elector might express himself on the proposition of annexation was quite liberal as to the method whereby that choice might be indicated, and that it was not intended to curtail it in any respect. That prior provision is that the "qualified electors residing in said territory so proposed to be annexed shall be invited to vote upon such propositions by placing upon the ballots the words 'For Annexation' or the words 'Against Annexation' or words equivalent thereto." By this provision any method of indicating his wish upon the subject, either by placing upon the ballot "For Annexation" or "Against Annexation," or "words equivalent thereto" was permitted, and, as we say, it was doubtless the intention of the legislature, while providing that the general election law should apply to elections under the Annexation Act, "as far as may be," to relax the provisions of that law as to marking in the voting square and to permit the expression of the voter to be indicated by marking the ballot in any manner which would clearly and reasonably indicate such choice. It will be observed that under the first provision of the act inviting the voters to indicate their choice on the proposition submitted by the use of the words there mentioned or equivalent words it is not required that the ballot furnished to the voter shall have these words or any equivalent words printed on it. The city of Long Beach might have provided a blank form of ballot which would have permitted the voter, as the section permitted him, to indicate his choice by writing thereon the words specially mentioned in the provision or other equivalent words. The municipality could, it is true, print on the ballots furnished the voters the words "For Annexation" or "Against Annexation." This would be a substantial compliance with the statute as was held in *People v. Los Angeles*, 133 Cal. 345, 346, [65 Pac. 752], as far as submitting the proposition to the choice of the voters. At the same time it would not have interfered with the right of the voter, or limited that right, as to the mode he might adopt in giving expression to the alternative choice submitted

to him. In the case last cited it appears that in the annexation election in question there a ballot similar to the one used in this election was submitted to be voted on with similar instructions to the voter to place the cross in the square. While the precise point made here does not appear to have been involved in the case cited, still the court in holding that such a ballot might be provided for the election and would be a substantial compliance with the first provision of the Annexation Act, says as to the effect to be given to the ballot where so provided and used that "it (the ballot) should be read in the light of all the circumstances surrounding the election and the voter, and the object should be to ascertain and to carry into effect the intention of the voter, if it can be determined with reasonable certainty. The ballot should be liberally construed and the intendments should be in favor of a reasoning and construction which will render the ballot effective rather than some conclusion which will, on a technical ground, render it ineffective. (*Behrenmeyer v. Kretz*, 135 Ill. 595, [26 N. E. 705].)"

If the provision of the General Election Law was to be applied as appellants insist it should, it would be a restriction and limitation of the liberal method which the Annexation Act itself offered the voters to express their choice, and while the legislature might make such a restriction, notwithstanding the method was otherwise liberally extended, we should not construe a provision which is indefinite and doubtful on the subject as having accomplished that result. Under this view, we perceive no reason why these ballots should not be held valid. The voter has clearly indicated by his manner of voting his choice upon the proposition. The only purpose of the annexation law is to ascertain the wishes of the voters upon the subject—the number of those voting in the affirmative and those voting in the negative—and it is apparent from the general language used that great liberality was intended to be afforded to the voter in expressing his choice, and that any method which the voter adopted filled this requirement. All that is necessary is that it be manifest from the ballot of the voter that he has clearly indicated his choice upon the subject, and in using a cross to indicate such choice it is not necessary under the annexation act that he use it in conformity with the general election law.

and that he should place it in the voting square. It is necessary only that he so use it that its use leaves no doubt as to how he intended to vote upon the proposition. When he has done this he has complied with the annexation law as to voting and the vote must be counted. Now, take the ballots in question. There can be no doubt but that the two voters who placed a cross in the parallelogram to the right of the words "For Annexation" intended to vote affirmatively upon the proposition; neither can there be any doubt that the one who stamped the cross in the same place after the words "Against Annexation" intended to vote negatively on it; nor can it be doubted that the voter placing the cross in the numeral square to the left of the words "For Annexation" intended to vote in behalf of the proposition. So that the intention of the voter being clear from the ballot the purpose of the provisions of the annexation law was accomplished in the method it allowed and the votes were legal and valid.

This being true, it cannot be, as suggested by counsel for appellants, that these crosses, as placed by the voters, were distinguishing marks. The crosses were placed on the ballot where the voter had a right legally to place them, and hence, are not subject to the objection that they constituted distinguishing marks. (*Tibbe v. Smith*, 108 Cal. 108, [49 Am. St. Rep. 68, 41 Pac. 454].)

It is insisted, however, by the appellants that even if the provisions of the general election law as to placing the cross in the voting square is not applicable to the election held under the Annexation Act, still the notice of election given by the board of trustees of the city of Long Beach and the directions on the ballots requiring that "to vote, stamp the cross (X) in the voting square to the right of and opposite the answer you desire to give" was a mandatory requirement and non-compliance therewith rendered the ballots in question invalid. There is no merit in this claim. While counsel for appellants have cited a number of cases in support of this proposition they are cases where elections were held under the general election laws. But as we have concluded that the provisions of the general election law are not applicable under the terms of the Annexation Act,—at least to the extent of marking the ballot by placing the cross in the voting square—there is nothing in the act anywhere authorizing the board of trustees to

prescribe any directions as to placing the cross in a voting square. The statute, as we have seen, is quite liberal in its terms and allows the voter to adopt any method of stamping a cross on his ballot which will show the intent with which he voted on the proposition submitted. While it was not improper in the notice of election to direct the voter where he should mark his ballot so as to best evidence his intention, still such directions could not have the force of mandatory provisions because they are not authorized by any provision of the Annexation Act. In order to be mandatory it must at least appear that the directions were warranted by some provision of law. There being no such provision, the directions on that subject by the board in the notice of election and on the ballots was directory merely and non-compliance therewith did not invalidate the ballot so long as it appeared from any mode of stamping thereon that the voter had clearly indicated his choice on the submitted proposition.

While some other points are made by the appellants as to the canvass of the vote by the board of trustees of the city of Long Beach and upon the findings made by the court, we do not perceive that they present any errors which would call for a reversal of either the order or the judgment, and they are both affirmed.

Henshaw, J., Angellotti, J., Shaw, J., and Sloss, J., concurred.

[S. F. No. 4652. Department One.—May 12, 1908.]

JONAS SALSTROM et al., Respondents, v. ORLEANS BAR GOLD MINING COMPANY, Appellant.

HYDRAULIC MINING—OBSTRUCTION OF STREAM—INJURY TO LAND BY DEBRIS—LACK OF NEGLIGENCE.—An hydraulic miner, who places a bar in the course of a natural stream, and above the same deposits his mining debris, so as to cause a portion of the land of a riparian proprietor to be washed away, and the remaining portion to be covered with detritus, is liable for the resulting damage, irrespective of any question of negligence; and the fact that the miner uses all the care for the protection of the riparian proprietor's land consistent with the conduct of his mining operations is immaterial.

ID.—EVIDENCE OF DAMAGE.—In the present case, the evidence is reviewed and held to sustain the verdict of the jury as to the amount of damage inflicted on the plaintiff's land by the wrongful acts of the defendant.

ID.—LAND AVAILABLE FOR MINING AND AGRICULTURE—MEASURE OF DAMAGES.—The use of land for hydraulic mining, causing a destruction of the upper soil, and its use for agricultural purposes, are necessarily incompatible; and where land available for both of such uses is injured, the utmost that the owner can claim is that the amount of injury be determined upon the basis of the availability of the land for the most valuable use for which it can be used.

ID.—ELEMENTS DETERMINING MEASURE OF DAMAGES.—Where land, a portion of which is available exclusively for hydraulic mining purposes, and the balance of which is available for such purposes and is also available for and used for agricultural purposes, is injured by being covered with mining debris, the true rule as to the measure of damages is this: 1. The value of the growing crop destroyed; 2. As to the land available exclusively for mining purposes, if the cost of repairing the injury by removing the debris would amount to less than the value of the property as it was prior to the injury, such cost would be the proper measure of damage, but if such cost would exceed such value, then the value of the property would be proper measure. As to the land used for agricultural purposes, if such land had a greater value for mining purposes than agricultural purposes, the same rule would apply as in the case of the other land, but if more valuable for agricultural purposes, and it was absolutely destroyed for such purposes, the value of the land is the proper measure.

APPEAL from a judgment of the Superior Court of Humboldt County and from an order refusing a new trial. G. W. Hunter, Judge.

The facts are stated in the opinion of the court.

L. F. Puter, Denver Sevier, and Page, McCutchen & Knight, for Appellant.

Gillett & Cutler, and F. A. Cutler, for Respondents.

ANGELLOTTI, J.—This is an appeal from a judgment and an order denying a new trial in an action brought by plaintiffs for damages to their land, alleged to have been caused by unlawful acts of defendant in conducting its hydraulic mining operations. There was a verdict in plaintiffs' favor for nine thousand dollars. On motion for new

trial, the trial court ordered that the motion be granted unless plaintiffs remitted all over and above seven thousand dollars, and costs of suit, in which event the motion was to be denied. This plaintiffs did by filing their written consent to the modification of the judgment within the time and in the manner prescribed by the trial court.

Plaintiffs were the owners of a tract of land containing about seventy-eight acres, in Humboldt County, extending on the easterly side to and there fronting on Camp Creek for a considerable distance. The defendant owned land adjoining plaintiffs' land on the creek frontage and running northerly along said creek for a considerable distance above plaintiffs' lands. The theory of plaintiffs' case as shown by the complaint was that defendant, in making a large prospect-cut in its land opposite plaintiffs' land, had thrown a large quantity of gravel, boulders, and earth into the creek, forming a bar therein, and that in operating a placer mine above plaintiffs' premises, it had caused a large amount of "boulders, gravel, detritus and debris" to be placed in the waters of Camp Creek, which were prevented from being carried down said creek past plaintiffs' land solely by reason of said bar, the result being that the waters of the creek were diverted from their natural and ordinary channel and thrown with great force against and upon plaintiffs' land, washing away a portion thereof, with a growing crop of grain thereon, and covering such portion with a deep deposit of gravel and boulders.

1. There was evidence sufficient to sustain the conclusion of the jury that the injury to plaintiffs' land and crop was solely due to the acts of defendant so alleged in the complaint. This was not questioned in defendant's opening brief, which was devoted exclusively to the discussion of alleged errors in instructions given to the jury, and the claim that the damages awarded were excessive. An attempt is made in the closing brief to show that the evidence demonstrates that the injury was in part caused by mining operations by plaintiffs themselves and others, but the record shows that the evidence was conflicting on this proposition, and that there was evidence sufficient to warrant the jury in finding that the acts of plaintiffs and others in no degree contributed to such injury.

2. Complaint is made of the following instruction given to the jury at plaintiffs' request:

"One engaged in mining has a right to deposit his tailings in a running stream to a reasonable extent, but he has no right to flood a lower owner's land, and by depositing tailings and debris thereon to substantially injure or ruin the latter's property although he may have used all reasonable means to prevent such damage. No person or corporation has a right, directly or indirectly, to cover his neighbor's land with mining debris, sand, and gravel or other material so as to injure or damage the same. So I instruct you that if you find upon the evidence that the plaintiffs are in the possession of the land described in the complaint and were in such possession at and during the times therein mentioned, and if you further find that while they were in such possession the defendant caused to be placed in the channel of Camp Creek and upon the lands of plaintiffs a large obstruction, by placing in said creek and upon said land a large mass of earth, gravel, rocks, and boulders which caused the waters of said creek to flow upon and against plaintiffs' land, washing it away and damaging and injuring it, and if you further find that said defendant, after making such obstruction commenced mining operations by the hydraulic process upon its land and above plaintiffs' land and in so doing caused to be placed into Simm's Gulch a large mass of earth detritus, debris, gravel, rocks, and boulders, tailings from its mine, and if you further find that said detritus, debris, gravel, rocks, and boulders came down said gulch into Camp Creek and were thence carried by the waters of Camp Creek down stream to said obstruction and were there by reason thereof diverted to and upon the said land of plaintiffs, damaging and injuring the same, then you should render a verdict for the plaintiffs."

It is said that a portion of this instruction was outside the issues, but we think the whole thereof was pertinent to the issues and in line with the theory of plaintiff's case which was that by reason of the bar placed by defendant in the creek, and its deposit of debris in the creek above such bar, it caused a portion of plaintiffs' soil to wash away, and deposited on the subsoil remaining and on other adjoining land of plaintiffs a large amount of debris.

The instruction is not objectionable in that it ignores the question of negligence on defendant's part. It is thoroughly established that no matter how carefully the miner may con-

duct his operations, he has no lawful right to flood or wash away his neighbor's land, or deposit mining debris thereon, to its injury, and that if by the deposit of mining debris in the stream he causes such a result, he is liable for the resulting damage. The fact that he uses all the care for the protection of his neighbor's property consistent with the successful conduct of his mining operations is immaterial. (See 2 Lindley on Mines, sec. 843; *Hill v. Smith*, 27 Cal. 481; *Robinson v. Black Diamond Coal Co.*, 57 Cal. 412, [40 Am. Rep. 118]; *Hobbs v. Amador etc. Co.*, 66 Cal. 161, [4 Pac. 1147]; *Fitzpatrick v. Montgomery*, 20 Mont. 181, [63 Am. St. Rep. 62, 50 Pac. 416].) The instruction was not objectionable on the ground that it was argumentative, or contradictory and confusing.

3. It cannot be held that the evidence was not sufficient to support a conclusion that the damage to plaintiffs amounted to nine thousand dollars, which was the amount of the verdict. The evidence on this point was given entirely by plaintiffs' witnesses, defendant making no attempt to contradict such witnesses, and contenting itself with its effort to show that the damage was not caused by its acts. There is some difference between counsel on this appeal as to the quantity of land destroyed and injured, defendant's counsel asserting that only some three acres were thus affected, while plaintiffs declare the quantity to have been over eight acres. There was ample evidence to sustain plaintiffs' counsel in this regard. Plaintiff Jonas Salstrom testified that the portion of his land available for agricultural purposes and which he was engaged in farming extended to a certain line pointed out by him on the ground to a surveyor, and that the soil so available had been washed away as a consequence of defendant's acts to the present line of his agricultural land. The surveyor testified that the amount of land between these lines was 5.10 acres. It was further made to appear that extending from the original line of such farming land to Camp Creek, there were about four acres of mining ground included in plaintiffs' lines as stated in the complaint, only one of which had been mined, leaving three acres still available for mining purposes. Whatever uncertainty there may have been in the complaint in this regard, there can be no doubt that the case was tried upon the theory that the plaintiffs were entitled to recover for all

damage caused by defendant to any portion of the tract described in the complaint, which necessarily included in addition to the portion devoted to farming purposes, the portion in front thereof extending to the creek. As to these three acres, there was evidence to support a conclusion that the land had been so covered with mining debris by the acts of defendant, that it would cost from one thousand dollars to one thousand two hundred and fifty dollars an acre more to mine the land than it would otherwise have cost, and that the value of the land for mining purposes was sufficiently great to warrant such increased expenditure, or, in other words, that the value of the land for mining purposes was reduced by from one thousand dollars to one thousand two hundred and fifty dollars per acre by the acts of defendant. The same is true as to the 5.10 acres used for agricultural purposes, as to which there is testimony to support a conclusion that the value for mining purposes was the same as that of the other three acres. There was in this warrant for a conclusion that the damage amounted to from one thousand dollars to one thousand two hundred and fifty dollars per acre for the whole 8.10 acres, and the growing crop destroyed was shown to be of the value of two hundred dollars.

4. A more serious question is presented by certain instructions on the measure of damage. After correctly instructing the jury in the general language of section 3333, Civil Code, that the amount to be awarded to plaintiffs in the event of a recovery was such amount as would compensate them "for all the detriment proximately caused" by the acts of defendant, not exceeding the amount named in the complaint, the court, at the request of plaintiffs, instructed the jury as follows:—

"In passing upon the question of damages, if you should find that plaintiffs are entitled to recover in this action, you may take into consideration the character and quality of the soil for farming purposes and the value thereof, and also the land for mining purposes prior to the injury complained of and what depreciation in the value thereof has been caused by the acts of defendant, if any."

Of its own motion the court gave this further instruction on the same subject:

"If you believe from the evidence that the plaintiffs are entitled to recover, then in ascertaining the amount of dam-

ages, you will determine from all the evidence as near as may be the value of the crop, if any, on the land washed away, and the difference between the value of their land for any and all purposes, prior to the injury and the value of the same after the injury, and this difference would be the measure of damages to which they would be entitled for permanent injury to their lands."

These were the only instructions given upon this particular matter, except a general instruction that the jury must use their best judgment in assessing damages to do what was right and fair and just. Plaintiffs' claim, sustained by his evidence, was that the 5.10 acres were worth five hundred dollars per acre for farming purposes, to which use they were then, and had been for several years, devoted. The effect of the defendant's acts, according to plaintiffs' claim, was necessarily to destroy the land so far as agricultural purposes were concerned, the soil adaptable to such use having been entirely washed away, and mining debris having been deposited thereon to such an extent that it would cost from one thousand dollars to one thousand two hundred and fifty dollars per acre more to mine the land than it would have cost had this change not been effected. The theory of learned counsel for plaintiffs, as indicated by his brief, appears to be that plaintiffs were entitled to recover as damages both the value of the land for farming purposes, five hundred dollars per acre, and the increase in the cost of mining the land, one thousand dollars to one thousand two hundred and fifty dollars per acre. It appears manifest to us that this cannot be so. No part of the land could be mined except by a process that would entirely destroy it for agricultural purposes, it being absolutely essential to completely remove the upper soil by what is known as ground sluicing in order to get at the gold distributed in the ground beneath. As long as any of the land was used for agricultural purposes, it could not be used for mining purposes, and when used for mining purposes, its value for agricultural purposes was destroyed. The two uses were necessarily absolutely incompatible. Under such circumstances, the most that a plaintiff can rightfully claim is that the amount of injury be determined upon the basis of the availability of the land for the most valuable use for which it can be used. The two uses being absolutely incompatible,

the property cannot well have a higher market value than its value for the most valuable use to which it is adapted. To hold otherwise would necessarily give double compensation to the owner of the land to the extent that the amount awarded exceeded the value for the most valuable purpose for which the land could be used. (See *Northern Pacific & M. Ry. Co. v. Forbis*, 15 Mont. 452, [48 Am. St. Rep. 692, 39 Pac. 571], and the cases there cited. Also *Spring Valley W. W. v. Drinkhouse*, 92 Cal. 528, [28 Pac. 681].) The true rule as to the measure of damages in the case at bar was this: Plaintiffs were first entitled to the value of the growing crop destroyed. As to the land available exclusively for mining purposes, if the cost of repairing the injury by removing the debris deposited by defendant would amount to less than the value of the property as it was prior to the injury, such cost would be the proper measure of damage. But if such cost of repair or of restoration would exceed such value, then the value of the property would be the proper measure. (See *Hartshorn v. Chaddock*, 135 N. Y. 116, [31 N. E. 997], and cases there cited.) As to the land used for agricultural purposes, if such land had a greater value for mining purposes than agricultural purposes, the same rule would apply as in the case of the other land, and on the other hand, if it was more valuable for agricultural than mining purposes, it having been absolutely destroyed for such purpose, plaintiffs would be entitled to the value testified by plaintiff to be five hundred dollars per acre. Defendant's claim is that the instructions on the subject of damage hereinbefore set forth were in line with the theory of counsel for plaintiffs as we have stated, and practically told the jury that they could allow plaintiffs both the amount that the land was worth for farming purposes, and the damage to it as mining property. This we are satisfied was, under the circumstances of this case, and in the absence of other instructions more precisely defining the rights of the parties, the effect of the instructions complained of, the sense in which the jury were reasonably warranted in taking them and in which they probably did take them. They were, therefore, prejudicially erroneous.

The utmost possible effect of such instructions was to improperly increase the verdict against defendant by two thousand five hundred and fifty dollars. It is impossible for us to

say upon what theory the learned judge of the trial court reduced the verdict from nine thousand dollars to seven thousand dollars, and consequently such reduction cannot be held to have obviated in any degree the effect of such error. As such effect may be absolutely obviated by a remission of such amount, and as the proceedings were correct in all other particulars, so far as this record shows, plaintiffs should not be compelled to try the case again in the event of their willingness to remit such amount.

It is ordered that in the event that plaintiffs, within thirty days from this date, file with the clerk of this court their written consent to a modification of the judgment in their favor by the deduction of two thousand five hundred and fifty dollars, leaving the same to stand for four thousand four hundred and fifty dollars and the costs of suit, said judgment shall be modified accordingly, and the order denying a new trial shall be affirmed; but that in the event that said consent be not so filed within said time, the judgment and order denying a new trial shall be reversed.

Shaw, J., and Sloss, J., concurred.

Hearing in Bank denied.

[S. F. No. 4538. In Bank.—May 12, 1908.]

H. C. CHESEBROUGH et al., as Executors, etc., of Charles Hanson, Deceased, Respondents, v. CITY AND COUNTY OF SAN FRANCISCO, Appellant.

TAXATION OF SHARES OF STOCK IN DOMESTIC CORPORATION.—Under the provisions of the state constitution, declaring that all property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, and that the word "property" includes shares of stock, and sections 3617 and 3627 of the Political Code, it is the duty of the assessor to assess shares of stock in corporations organized under the laws of California at their full value, unless there is something in the provisions of such code which exempts them from such taxation.

ID.—VALUE OF SHARES OF STOCK, HOW DETERMINED—DOUBLE TAXATION.—Under section 3608 of the Political Code, for purposes of taxation, the shares of stock in a corporation represent the value of the aggregate of the assets of the corporation, and have no value independent of the corporate property, and when all such property is assessed to the corporation it would be double taxation to assess the shares as well as the corporate property. Such result could only follow where all the property of the corporation was assessed to it, and would not result where none, or only a portion of the property of the corporation going to make up the value of the stock, was taxed to it.

ID.—PROPERTY OUTSIDE OF STATE—NO DEDUCTION ON ACCOUNT OF.—While the value of the corporate shares is determined by the aggregate value of the corporate property, such property may or may not be within the jurisdiction of the state for purposes of taxation. If it is within the state, and assessed to the corporation, then the shares of stock cannot also be assessed to the stockholders, as that would constitute double taxation. But section 3608 of the Political Code does not exempt such shares from taxation when all the assets of the corporation are not taxed in this state by reason of the fact that some of them are beyond its jurisdiction. Neither is it material that the tangible property of the corporation is situated in some other state and has there been taxed. The fact that some of the property of the corporation is assessed in another state or country is no prohibition of the taxation of the shares of stock held here. The inhibition of double taxation only applies to such taxation in the same state or government.

ID.—CONSTRUCTION OF SECTION 3608 OF POLITICAL CODE—VALUE OF STOCK, HOW DETERMINED.—Section 3608 of the Political Code, properly construed, only means that when the aggregate property of a California corporation is assessed in this state, shares of stock of the corporation shall not be assessed, but that if all such property is not here assessed the actual value of such stock, less the value of the corporate property which is assessed here, shall be taxed. Property of the corporation located outside of the state, and over which the state cannot exercise its sovereign power of taxation, is not to be considered in diminishing the actual value of the stock held here for purposes of taxation. A contrary construction of that section would render it unconstitutional.

ID.—CONSTRUCTION OF STATUTE—CONSTITUTIONAL LAW.—When a legislative enactment is capable of two constructions, one consistent and the other inconsistent with the provisions of the constitution, it should be so construed as to make it harmonious with the constitution and comport with the legitimate powers of the legislature.

ID.—METHOD OF ASCERTAINING TAXABLE VALUE.—Sections 3617 and 3627 of the Political Code, defining cash values and declaring that all property should be assessed thereat, provides an adequate method

of ascertaining the taxable value of such shares of a domestic corporation for assessment to the individual stockholders.

ID.—ACTUAL CASH VALUE OF STOCK—DEDUCTION OF VALUE OF CORPORATE PROPERTY IN STATE.—In assessing shares of stock in a California corporation to the individual stockholders, the proper method to be followed by the assessor, in order to avoid double taxation and at the same time to assess the stock at its full cash value, is to deduct the value of the corporate property actually assessed in this state from the value of the shares, and to assess the stock as of the value diminished by the deduction.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Percy V. Long, City Attorney, W. I. Brobeck, Assistant City Attorney, Jesse H. Steinhart, Assistant City Attorney, Wm. G. Burke, City Attorney, and A. S. Newburgh, Assistant City Attorney, for Appellant.

Jordan, Treat & Brann, Jordan & Brann, and Jordan, Rowe & Brann, for Respondents.

LORIGAN, J.—This action was brought by the plaintiffs as executors of the estate of Charles Hanson, deceased, to recover from the defendant the sum of \$5,765.26 paid under protest for taxes on certain shares of stock assessed to said estate. The action arose out of a state of facts set forth in the findings of the court and which in substance are as follows: The Tacoma Mill Company is a corporation duly organized and existing under the laws of this state having its principal place of business in the city and county of San Francisco, with a capital stock of five hundred thousand dollars, divided into ten thousand shares of the par value of fifty dollars per share. Charles Hanson, the deceased, at the time of his death was a resident of the city and county of San Francisco and owned 9,998 shares of stock of said corporation which had an actual par value of \$499,900. It was further found by the court that the Tacoma Mill Company owned and possessed property in the state of Washington on the first Monday of March, 1902, at twelve o'clock noon of said day, of the actual value of four hundred thousand dollars and over; that said Tacoma Mill

Company further owned and possessed in San Mateo County in this state property which was assessed by the assessor of that county and was of the value of twenty-one thousand one hundred dollars; that said Tacoma Mill Company further owned property in the city and county of San Francisco which was of the actual value of and assessed for one hundred and fifty dollars, making the value of the corporation's California property twenty-one thousand two hundred and fifty dollars. The assessor of the city and county of San Francisco assessed said shares of the Tacoma Mill Company owned by Charles Hanson in his lifetime to his estate at a valuation of three hundred and fifty thousand dollars, and there was levied thereon the amount of taxes for the recovery of which this suit is brought. Plaintiffs paid said taxes under protest and thereafter brought this action for the recovery of the amount so paid. Judgment was rendered against defendant, the superior court holding that the assessment of said stock belonging to the estate of Charles Hanson, deceased, by the assessor of the city and county of San Francisco, and the subsequent collection of the taxes levied thereon by the tax-collector of said city and county were illegal and void acts, in violation of the constitution of the state of California and section 3608 of the Political Code of the state, and constituted illegal and double taxation of the property belonging to said estate. This appeal is taken from the judgment.

We are at a loss to understand upon what legal basis, under the facts in this case, it can be asserted that the assessment of this stock to the estate of Hanson constituted double taxation.

The constitution of this state declares that all property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value to be ascertained as provided by law, and that the word "property" includes shares of stock. The legislature has declared that taxable property shall be assessed at its full cash value (Pol. Code, sec. 3627), and that cash value means the amount at which the property would be taken in payment of a just debt due from a solvent debtor (Pol. Code, sec. 3617). Under these provisions of the law it is the duty of the assessor to assess shares of stock at their full value, unless there is something in the provisions of the code which exempts them from such taxation. The only section of the code under which it can be claimed that

such exemption exists is section 3608 of the Political Code, which provides: "Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent; and the assessment and taxation of such shares, and also all the corporate property, would be double taxation. Therefore, all property belonging to corporations, save and except the property of national banking associations not assessable by federal statute, shall be assessed and taxed. But no assessment shall be made of shares of stock in any corporation, save and except in national banking associations, whose property, other than real estate, is exempt from assessment by federal statute." The purpose and meaning of this section is, however, plain. Shares of stock represent the value of all the assets of the corporation. (*People v. National Bank of D. O. Mills & Co.*, 123 Cal. 60, [69 Am. St. Rep. 32, 25 Pac. 685].) As the shares of stock represent no value independent of the corporate property, when all such property is assessed to the corporation, it would be double taxation to assess the shares, as well as the corporate property. As said in *Burke v. Badlam*, 57 Cal. 601, "To assess all of the corporate property of the corporation and also to assess to each of the stockholders the number of shares held by him, would, it is manifest, be assessing the same property twice, once in the aggregate to the corporation, the trustee of all the stockholders, and again separately to the individual stockholders, in proportion to the number of shares held by each." But, as was said in that case, this result of double taxation could only follow where all the property of the corporation was assessed. It could not apply where none, or only a portion, of the property of the corporation going to make up the value of the stock was taxed. While the value of shares of stock is determined by the aggregate value of the corporation property, the property which goes to make up such value may or may not be within the jurisdiction of this state. If it is within the state and assessed to the corporation, then the shares of stock may not also be assessed to the stockholders, as that would clearly constitute double taxation. But section 3608 cannot be extended so as to exempt such shares from taxation when all the assets of the corporation are not taxed in this state by reason of the fact that some of them are beyond its jurisdiction. Neither

is it of moment that the tangible property of the corporation is situated in some other state and has there been taxed. The fact that some of the property of the corporation is assessed in another state or country is no prohibition of the taxation of the shares of stock held here. This does not constitute taxation of all the property of the corporation within the terms of the section. The inhibition of double taxation only applies to such taxation in the same state or government.

Section 3640 of the Political Code, until repealed and its place taken by section 3608 of that code, provided: "The owner or holder of stock in any firm or corporation, the entire capital or property whereof is assessed, must not be assessed individually for his stock in such firm or corporation." This and section 3608 declared the same legal principle against double taxation. It is held by this court in *City and County of San Francisco v. Fry*, 63 Cal. 470, that section 3640, cited above, applied only to corporations whose property is situated in this state. The court there said: "It is further urged that to tax the shares in this state, when the property of the corporations is taxed in the state of Nevada would be double taxation. But the inhibition of double taxation only applies to such taxation made by the same state or government. There is a double taxation or 'duplicate taxation,' as it is styled by Judge Cooley, which is wholly inadmissible under any constitution requiring equality and uniformity in taxation. 'By duplicate taxation in this sense,' says the learned author above named, 'is understood the requirement that one person, or any one subject of taxation, shall directly contribute twice to the same burden while other subjects of taxation belonging to the same class are required to contribute but once.' (Cooley on Taxation, p. 164.) It will be seen that, in this state, the shares of the corporation alone are taxable. Its property is not here assessed. Conceding that taxation of the shares and property of a corporation by the state of California would be double taxation, there is here no taxation of that kind."

In the case of *City and County of San Francisco v. Flood*, 64 Cal. 504, [2 Pac. 264], it is also declared: "As to sections 3640 and 3641 of the Political Code, relied on to show that the shares above mentioned are not taxable, in our opinion section 3640 by its express terms only exempts the shares

from assessment where the entire capital or property of the corporation in which the shares are owned is assessed, and it does not appear that the corporation or corporations, in which the shares here assessed were owned, were assessed at all during the fiscal year for which the assessment herein was made."

There is no difference between the former section 3640 and the present section 3608 as far as the application of the doctrine there laid down is concerned. Under either section the exemption of the stock of a corporation from taxation only exists where there is assessed in this state to the corporation all the property thereof, the value of which is represented by the shares of stock. Section 3608, while declaring that no shares of the stock shall be assessed, is to be read in the light of the preliminary language of the section declaring the reason why it should not be, and was intended to mean only, that as shares of stock represent the value of the property of the corporation, so when all the property of the corporation in the state is taxed it would be double taxation to assess both, and that where all the property of the corporation was assessed the shares of stock should not be. It was not meant or intended that if less than the aggregate value of the property of the corporation was assessed in this state, that the actual value of the corporate stock in excess of the value of the corporate property so assessed should not be taxed here. It means only that when the aggregate property of the corporation is assessed in this state, shares of stock of the corporation shall not be assessed, but that if all such property is not here assessed, the actual value of such stock, less the value of the corporate property which is assessed here, shall be taxed. Property of the corporation located outside of the state and over which the state cannot exercise its sovereign power of taxation is not to be taken into consideration in diminishing the actual value of the stock held here for purposes of taxation. In the case of *Commercial National Bank v. Chambers*, 21 Utah, 324, [61 Pac. 560], in the constitution of which state provisions are found relative to the taxation of stock such as are in our constitution, it is said: "In the case at bar deductions were made from the value of the stock of the value of all real estate owned by the bank which is situate within the limits of the state, but

deductions for its real estate without the state were refused by the assessor and board of equalization, but the court below ordered that the value of the real estate situate in other states should also be deducted from the value of the stock. In this we think the court erred. . . . The state has a right to fix a particular *situs* as to such stock (corporate stock) for the purposes of taxation, and its value for such purposes cannot be diminished by deducting therefrom the value of property not situated or taxable within the state, and over which the state can exercise no control. The bank, therefore, had no right to have the value of its real estate situate without the state deducted from the value of the stock. 'The true criterion, as fixed by the statute, is the true value of the stock, without reference to the question where, or in what manner or nature of property or security, the capital stock may be invested. Whether that be invested in real estate or other property beyond the jurisdiction of this state, the latter having control over the shares and their true value, the peculiar nature and value of the investment of the capital stock of the corporations beyond the limits of the state can form no proper subject for specific deduction or abatement from the true value of the shares of stock when presented to be assessed for purposes of taxation. It is exclusively with the shares of stock, and their true value, as representing the entire corporate assets, that the tax-commissioner has to deal, and not with the nature and locality of the investment of the capital stock of the corporation, except as to the real estate of the company situate within this state.' (*American Coal Co. v. Allegany County*, 59 Md. 185; *Dwight v. Boston*, 12 Allen, 316, [90 Am. Dec. 149]; *Nevada Bank v. Sedgwick*, 104 U. S. 111, [26 L. Ed. 703]; *Kelly v. Rhoads*, 7 Wyo. 237, [75 Am. St. Rep. 404, 51 Pac. 593]; affirmed in 9 Wyo. 352, [87 Am. St. Rep. 659, 63 Pac. 935].)" (See same cases, 188 U. S. 1, [23 Sup. Ct. 259]; *Commercial Nat. Bank v. Chambers*, 182 U. S. 556, [21 Sup. Ct. 863].)

If section 3608 were to be given any other construction than as heretofore suggested it would be unconstitutional. We have seen that the constitution declares that shares of stock are property and that it requires all property to be assessed in proportion to its value to be ascertained as pro-

vided by law. Shares of stock when held in this state by our citizens are subject to the taxing power of the state as personal property following the person of the owner and are taxable at their full value, and under the constitutional provisions above referred to they must be so taxed. No property is exempt from taxation except as declared in the constitution, which, of course, does not include shares of stock. If section 3608 is to be construed as a direction to the assessor that shares of stock in a corporation are not to be assessed and the effect of that direction is to exempt—when all the property of the corporation is not assessed in this state—shares of stock from taxation, it would be unconstitutional. (*Crocker v. Scott*, 149 Cal. 575-588, [87 Pac. 102].)

For assuming that ten thousand shares of stock in a domestic corporation of the actual par value of one hundred thousand dollars were held in this state and that the assets of the corporation contributing to that value were located, twenty-five per cent thereof in this state assessed to the corporation, and seventy-five per cent located outside of the state and beyond our jurisdiction for taxation purposes, it is quite clear that if the stock held here is not assessed, that seventy-five thousand dollars' worth of property, which the constitution requires should be taxed at its full value, has been exempted from taxation. Only twenty-five per cent of its value has been taxed by the taxation of the corporate property in this state. The other seventy-five per cent is represented by the assets outside of the state, and to that extent the actual value of the stock will be exempt from taxation. Or, to illustrate further, if no property is assessed here to the corporation and the stock cannot be assessed, it necessarily follows that one hundred thousand dollars' worth of property is exempt under the section in question.

If this were the effect which must result from a literal construction of section 3608 it would clearly be unconstitutional as exempting property from taxation which the constitution requires shall be taxed. But we are not compelled to so construe it. When a legislative provision is capable of two constructions, one consistent and the other inconsistent with the provisions of the constitution, it is a

well-recognized principle of construction that the statute should be given that construction which will make it harmonious with the constitution and comport with the legitimate powers of the legislature. (*People v. Frisbee*, 26 Cal. 135; *Jacobs v. Supervisors*, 100 Cal. 121, [34 Pac. 630]; *In re Mitchell*, 120 Cal. 384, [52 Pac. 799].)

Applying this principle to the section in question in connection with the constitutional provisions requiring the taxation of all property, including shares of stock, at its full value, and it must be taken to mean that when the property of the corporation in the state is taxed directly to the corporation, the shares of stock held here and subject to taxation shall not, to the extent that the property represented by it is taxed, be thus taxed. This exemption can only be extended, however, to deductions from the value of the shares of stock, the corporate property of which is situated in this state and directly taxed to the corporation. It is the purpose of all revenue laws, as nearly as possible, to impose upon all property its just proportion of taxation, and a construction of the statute should not be had which will permit shares of stock, held here of vast value in domestic corporations whose properties are located beyond the state, to escape their just proportion of such taxation.

Under these views the shares of stock of the Tacoma Mill Company held by the estate of Hanson, except to the extent that the property of the corporation in this state was actually assessed and taxed to the company, were taxable to their full value.

It is, however, insisted by respondents that while the constitution has declared shares of stock to be property and to be taxed in proportion to their value, to be ascertained as provided by law, still the legislature has not provided a method of ascertaining the taxable value of such shares as shall be paid by the individual stockholders which does not violate those provisions of our law now in force prohibiting double taxation and requiring that all property shall be assessed at its full cash value.

We do not think this position well taken. While these provisions of the constitution are not self-executing, the legislature immediately subsequent to the adoption of that constitution supplied any deficiency by providing a standard

under which values could be measured by passing sections 3617 and 3627 of the Political Code defining cash values and declaring that all property should be assessed thereat. (*Crocker v. Scott*, 149 Cal. 575-588, [87 Pac. 102].)

The method of taxation adopted by the assessor was to deduct from the value of the shares held by the estate of Hanson the value of the corporate property situated in this state and taxed directly to the corporation. This is the only method he could have adopted in order to avoid double taxation of the property which is prohibited by section 3607 of the Political Code, and conforms to the provisions of the sections above cited.

It is made the duty of assessors to assess the property of corporations in the counties where found. (Pol. Code, sec. 3641.) The assessors of San Mateo and San Francisco counties found property of the Tacoma Mill Company within their respective counties, which they assessed to that corporation at its actual cash value aggregating \$21,250. The assessor of San Francisco found shares of said Tacoma Mill Company owned by the estate of Hanson in the city and county of San Francisco, which it was his duty to assess at its full cash value (Pol. Code, secs. 3607, 3617, 3627), unless he found, as we have construed section 3608 to mean, that the corporation property which they represented was fully taxed in the state. As he did not find the corporate property so fully taxed it was the duty of the assessor to assess these shares of stock. In doing so it was necessary to avoid a double taxation. Obviously, the only way he could avoid it, and at the same time carry out the mandate of the law requiring the taxation of the property of the corporation and the taxation of the shares of stock at their full cash value, was to deduct the value of the corporate property actually assessed in the state from the value of the shares and tax the stock as of the value diminished by the deduction. Under our view of the construction to be given to section 3608, taking into consideration with it the other provisions of the Political Code and those of the constitution, this was the only legal method the assessor could have adopted to avoid double taxation, and in our judgment was the proper one.

As to whether in adopting this method the shares of stock were assessed at their full cash value. As has been seen

a share of stock represents no value outside of the actual value of the property of the corporation it stands for and represents. (Pol. Code, sec. 3608; *Burke v. Badlam*, 57 Cal. 601.) In the cited case of *Burke v. Badlam* it is said that "When all the property of the corporation is assessed, then all of the stock of the corporation is assessed and the mandate of the constitution is complied with." (See, also, *Crocker v. Scott*, 149 Cal. 575-588, [87 Pac. 102].) These being judicial and legislative declarations on the subject, it necessarily follows as tersely and logically put by one of the counsel for appellants in his brief, "That if the constitutional provision demanding the taxation of the shares of stock at its full cash value is satisfied when no part of the stock is taxed and when all of the property of the corporation is taxed, this constitutional provision must necessarily be satisfied when a part of the stock is taxed and the rest of the tax levied against the corporation property. This is taxation of all the property at its full cash value."

Upon both these propositions urged by respondents we are satisfied that in order to have assessed the shares of stock in harmony with the code and constitutional provisions, the method adopted by the assessor was the only one whereby the full cash value of the shares could be ascertained for the purposes of taxation and to have avoided double taxation. (*Commercial Nat. Bank v. Chambers*, 21 Utah, 324, [61 Pac. 560].)

It follows that the trial court was in error in holding that the assessment of these shares of stock as made was violative of either the constitutional provisions, or of section 3608 of the Political Code, or that the assessment of said shares and the levy of a tax thereon constituted double taxation.

As to the order to be made on this appeal. The appeal is from the judgment alone. The judgment involved two causes of action. As to the first, appellant consented to a judgment in favor of respondents in the court below. This appeal involves only the judgment on the second cause of action and to which our consideration has been addressed. In the view we take of it, the judgment should have been entered on the findings by the trial court for the appellant. It is therefore ordered that the judgment as to the first cause of action consented to by appellant in the court below be affirmed. As

to the second cause of action the judgment is reversed with directions to the trial court to enter a judgment upon the findings in favor of the appellant as to said second cause of action. Appellant is also awarded costs on this appeal.

Henshaw, J., Angellotti, J., Shaw, J., and Sloss, J., concurred.

[S. F. No. 4378. Department One.—May 15, 1908.]

SUMNER CAHILL, by P. Cahill, Guardian ad Litem, Appellant, v. E. B. & A. L. STONE & CO., and ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY, Respondents.

NEGLIGENCE—DANGEROUS PUSH-CAR LEFT UNGUARDED—KNOWN USE BY CHILDREN—INJURY TO BOY—SUFFICIENT COMPLAINT.—A complaint by a young boy of twelve years of age for injuries alleged to have been sustained by the negligence of the defendants in leaving a push-car unguarded and unlocked standing on rails on a public street, which alleges that children were accustomed to play thereon with the knowledge and consent of the defendants, and that plaintiff had his foot crushed while endeavoring to stop the car while in motion, states a cause of action, and a general demurrer thereto was improperly sustained.

ID.—DUTY TO USE ORDINARY CARE TO PREVENT INJURY TO CHILDREN—IMPUTED KNOWLEDGE.—Those who place an attractive but dangerous contrivance in a place frequented by children, and knowing or having reason to believe that children will be attracted to it and subjected to injury thereby, are chargeable with knowledge that they are usually unable to foresee, comprehend, and avoid the danger into which they permit them to be allured, and owe the duty to use ordinary care to prevent injury to them.

ID.—CONTRIBUTORY NEGLIGENCE PRECLUDED ON DEMURRER.—Where the complaint alleged that the plaintiff was too young and inexperienced to foresee the danger, the question of contributory negligence on his part is precluded, where the defendants rest upon their demurrer to the complaint.

ID.—AGE OF ACCOUNTABILITY FOR CONTRIBUTORY NEGLIGENCE—QUESTION OF FACT.—There is no precise age at which, as matter of law, a child is to be held accountable for all his actions to the same extent as one of full age. There is no conclusive presumption that a twelve-year-old boy was able to foresee the danger attending his

action which led to his injury, as against an admitted averment to the contrary. The question is one of fact, to be shown by the evidence.

ID.—CONTRIBUTORY NEGLIGENCE MATTER OF DEFENSE.—Contributory negligence is matter of defense where it does not appear upon the face of the complaint, or by the evidence for the plaintiff.

APPEAL from a judgment of the Superior Court of Alameda County. Henry A. Melvin, Judge.

The facts are stated in the opinion of the court.

Haven & Haven, and Robert C. Porter, for Appellant.

Reed & Nusbaumer, and B. H. Griffins, for Respondents.

SHAW, J.—The defendants separately demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrers were sustained without leave to amend, judgment was given for the defendants thereon and plaintiff appeals.

The action is to recover damages for injuries sustained, alleged to have been caused by the negligence of the defendants. The only questions presented are whether or not the facts show that the defendants were chargeable with neglect of any duty owing by them to plaintiff, and whether or not the facts stated show that the neglect of the plaintiff caused or contributed to his injury. The following is a statement of the facts alleged.

The plaintiff, at the time of the accident, was twelve years of age. The defendants were constructing a railroad track in and upon one of the public streets in the city of Oakland. The track was laid to a point near the crossing of 56th Street. It was placed in a trench some two feet deep with sharp banks on each side situated about two feet distant from the rails. A push-car heavily loaded with steel rails was, by the defendants, negligently left standing on this track in the street, unguarded by any person, uninclosed, unlocked, and unfastened, without any brake or device for stopping it when started. It was of such weight that when put in motion, even on a very slight grade, it could not be readily stopped. The grade of the track at that point descended slightly toward

56th Street. This was in the center of a populous residence district of the city where many children lived. The lots abutting the street opposite where the car stood were not inclosed and children were accustomed to congregate there for play. On that day, and during all the time of the construction of the roadbed and track, children from five to fourteen years of age, with the knowledge and consent of the defendants, were accustomed to congregate upon and around said push-car and play upon said car, and defendants then well knew of the danger from said car and track to children in that vicinity. The plaintiff lived with his parents about two hundred and fifty yards distant from the point where the car was left on the track. Other children at play on said push-car had put it in motion. "Plaintiff was then and there attracted to said car by its said condition and appearance and said surroundings as a place of play, and said plaintiff was then and there too young and inexperienced to foresee the danger therefrom, and plaintiff then and there got upon said car with said other children" and in the course of his play upon the said car, and in an attempt to stop it as it was running down the rails upon which it had been left standing by the defendants, he was caught between the side of the car and the bank of said trench and his foot was thereby thrown beneath the car wheel and badly crushed. He sues for the damage resulting from this injury.

The contrary not being alleged, it is to be assumed that the defendants had the lawful right, under permission from the proper public authorities, to lay its track in the streets and leave the push-car standing thereon. The car being thus rightfully in the street, the plaintiff had no right to go upon it, or to interfere with it in any way, without the consent of the defendants. He would have been, with respect to the car, technically a trespasser, except for the allegation that children were accustomed to play upon it with the knowledge and consent of the defendants.

We cannot perceive wherein the case presented by the complaint, its absolute truth being unqualifiedly admitted by the demurrer, is to be distinguished from the line of decisions commonly known as the "turn-table cases." These cases rest upon the same general principle as those which hold liable the owner of premises over which is a path which, with his

||| knowledge and consent, is frequented by the public, and in which he places a dangerous and concealed obstruction which causes injury to a person passing along the path. (See 37 Cent. Dig. Cols. 390 to 393, for citations.) For like reasons, one who places an attractive but dangerous contrivance in a place frequented by children, and knowing, or having reason to believe, that children will be attracted to it and subjected to injury thereby, owes the duty of exercising ordinary care to prevent such injury to them, and this because he is charged with knowledge of the fact that children are likely to be attracted thereto and are usually unable to foresee, comprehend, and avoid the danger into which he thus knowingly allures them. The leading case on this subject in this state is *Barrett v. Southern Pacific Co.*, 91 Cal. 302, [25 Am. St. Rep. 186, 27 Pac. 666], where it was said: "If defendant ought reasonably to have anticipated that leaving this turn-table unguarded and exposed, an injury such as plaintiff suffered was likely to occur, then it must be held to have anticipated it, and was guilty of negligence in thus maintaining it in its exposed position. . . . A child of immature years is expected to exercise only such care and self-restraint as belongs to childhood, and a reasonable man must be presumed to know this and required to govern his actions accordingly. . . . And it has been held in numerous cases to be an act of negligence to leave unguarded and exposed to the observation of little children dangerous and attractive machinery which they would naturally be tempted to go about or upon, and against the danger of which action their immature judgment opposes no warning or defense." (Citing cases.) The same doctrine was affirmed in *Callahan v. Eel River etc. R. Co.*, 92 Cal. 89, [28 Pac. 104]. (See 21 Am. & Eng. Ency. of Law p. 474, for a full citation of cases.) The rule, of course, is not to be confined to turn-tables, but applies to any attractive and dangerous machinery so placed. (1 Kinkad || on Torts, sec. 26; 2 Cooley on Torts, 3d ed., p. 1270.)

It is true that in this state the rule has been strictly limited to the particular character of cases mentioned in the Barrett case. In *Peters v. Bowman*, 115 Cal. 349, [56 Am. St. Rep. 106, 47 Pac. 113, 598], wherein it was held that the owner of a lot was not liable for the death of a boy drowned in a pond on his premises, Mr. Justice McFarland,

speaking of the so-called "turn-table cases," says: "The rule as thus applied rested on the ground that the immature judgment of a young child could not well determine or provide against the danger of meddling with such machinery, and that, therefore, the railroad company was liable for legal negligence in erecting it and leaving it exposed as an attraction to children, and a temptation to them to intermeddle with it." It is further stated that the principle of these "turn-table cases," while well established in this state, is an exception to the general rule that the owner of land is under no legal duty to keep it in safe condition for others than those whom he invites there.

It is claimed by the respondents that later cases have practically repudiated the rule. An examination of the decisions, however, discloses the fact that in each case there was some feature by which it is distinguishable from cases similar to *Barrett v. Southern Pacific Co.*, *supra*, and also from the case at bar. The case of *George v. Los Angeles Railway Co.*, 126 Cal. 357, [77 Am. St. Rep. 184, 58 Pac. 819], is much relied upon as a case holding to the contrary. It is somewhat difficult to agree to the statement made in that case that the two instructions there considered were not contradictory of each other, but conceding that they are not conflicting, it is apparent that the instruction chiefly relied on by respondents included some acts of due care on the part of the defendants in that case which do not appear to have been exercised by respondents here. In that case a boy was injured while playing upon trailer cars allowed by the defendant to stand on the railroad track in a street in the city of Pasadena. The jury were instructed that if they found that the cars were held by brakes of the ordinary kind set in a manner to hold them unless loosened by some one, and that the only danger connected with the car was one open to the observation and which could be comprehended by a boy of plaintiff's age and of average intelligence the plaintiff could not recover. One of the conditions of the instruction was that the jury should find, as it did, that the defendant had exercised care and set the brakes so that the car would be held in place. In the present case the allegation is that the car was negligently left unguarded, uninclosed, unlocked, and unfastened. The distinction is pointed out in *Loftus v. Dehail*, 133 Cal. 217,

[65 Pac. 379]. It is that the "turn-table cases" rest in part upon the proposition that the danger created by the act of the owner could be easily removed by the simple device of locking or fastening the dangerous machinery and that while the owner of such machinery is not held to the exercise of great care in protecting it against the trespasses of children, it is required to exercise ordinary care to that end. In *Studer v. Southern Pacific Co.*, 121 Cal. 404, [66 Am. St. Rep. 39, 53 Pac. 942], the court was not considering the effect of the allegations of a complaint admitted to be true by a demurrer and averring that the defendant was negligent and that the child was too young and inexperienced to foresee the danger, but was considering the conceded fact that the boy was of ordinary capacity and intelligence and the undisputed evidence which the trial court had held sufficient to establish contributory negligence on his part. Many other cases are cited by the respondents in which similar questions arising upon the evidence were considered and in which it was held that, under the proof made, the child was guilty of contributory negligence either in exposing himself to the danger, or in failing to avoid it. (*Tucker v. New York etc. Co.*, 136 N. Y. 668, [33 N. E. 335]; *Merryman v. Chicago etc. Co.*, 85 Iowa, 634, [52 N. W. 545]; *Carson v. Chicago etc. Co.*, 96 Iowa, 583, [65 N. W. 831]; *Brown v. European etc. Co.*, 58 Me. 384; *Twist v. Winona etc. Co.*, 39 Minn. 164, [12 Am. St. Rep. 626, 39 N. W. 402]; *Kaumeier v. City Electric Ry. Co.*, 116 Mich. 306, [72 Am. St. Rep. 525, 74 N. W. 481].) It is, of course, possible in any case that the evidence may show that a child of twelve years of age is guilty of contributory negligence. It is not at all improbable that the evidence in this case would be strongly to that effect. The defendants did not see fit to await the coming in of the evidence, but interposed a demurrer which admits the truth of the allegations of the complaint. The cases involving a consideration of the effect of undisputed evidence showing negligence on the part of the child or evidence upon which a jury has so decided, are not applicable to the present case.

It is contended that the car was not in itself dangerous, and *Kaumeier v. City Electric Ry. Co.*, 116 Mich. 306, [72 Am. St. Rep. 525, 74 N. W. 481], is cited as holding this

proposition. It may be admitted that such a car would not be dangerous when not in motion. The same is generally true of any ordinary machinery. But we cannot agree to the proposition that a car set upon rails, upon which it may easily be moved by children, and of sufficient weight to crush a person over whose body it might pass, is not a dangerous thing for children to be allowed to play with. They have an instinctive desire to see machinery in motion and take delight in riding and if they have access to anything upon wheels they will usually set it going if able to do so, especially if they can ride upon it themselves. In the "turn-table cases" the turn-table would be harmless if left at rest. The danger arises from the propensity of children to set it in motion. The car in question was dangerous for the same reason.

It is claimed that as the boy was twelve years of age he must be considered capable of exercising care for his own protection and chargeable with negligence to the same extent as a mature person. There is no precise age at which, as a matter of law, a child is to be held accountable for all his actions to the same extent as one of full age. (*Consolidated etc. Ry. Co. v. Carlson*, 58 Kan. 66, [48 Pac. 635].) In that case it is said: "The question as to the capacity of a particular child at a particular time to exercise care in avoiding a particular danger, is one of fact, falling within the province of a jury to determine." The child there referred to was ten years of age. In *Biggs v. Consolidated etc. Wire Co.*, 60 Kan. 223, [56 Pac. 4], the same rule was applied to a boy of fourteen years, the court saying: "We cannot say, as a matter of law, at what age a boy would be possessed of such intelligence, foresight and judgment as to charge him with contributory negligence in a case like the present." In the case at bar the question of plaintiff's possession of sufficient intelligence and foresight is foreclosed, so far as the pleading is concerned, by the allegation that "he was too young and inexperienced to foresee the danger." It may be conceded that many boys of the age of twelve years would have perceived the danger attending the acts of the plaintiff which led to his injury. There is, however, no conclusive presumption that a twelve-year-old boy is able to foresee such danger, or that he has sufficient wisdom to avoid it. The question is one of fact to be shown by the evidence and is not to be presumed in the

face of an averment to the contrary. (*Jenson v. Will & Fink Co.*, 150 Cal. 403, [89 Pac. 113]; *Foley v. California H. Co.*, 115 Cal. 190, 194, [56 Am. St. Rep. 87, 47 Pac. 42].) If the defendants had gone to trial and awaited the production of evidence upon the subject, it may be that contributory negligence would have been clearly shown. But by the allegations of the complaint, upon which they chose to rest their case, no such negligence appears. Contributory negligence is matter of defense, where it does not appear upon the face of the complaint, or by the evidence for the plaintiff.

The judgment is reversed.

Angellotti, J., and Sloss, J., concurred.

[S. F. No. 4427. Department One.—May 15, 1908.]

HIBERNIA SAVINGS AND LOAN SOCIETY, Respondent v. JOHN FARNHAM, Administrator of Estate of Annie F. Lennon, Deceased, and JAMES H. BOYER, Appellants.

FORECLOSURE OF MORTGAGE—DEATH OF MORTGAGOR BEFORE MATURITY—

STATUTE OF LIMITATIONS.—Where a mortgagor died before the maturity of the note and mortgage, the statute of limitations does not begin to run until letters of administration are issued upon his estate, regardless of the lapse of time prior thereto.

ID.—PRIOR UNRECORDED DEED—MORTGAGE FOR VALUE—PRIOR RECORD—

RUNNING OF STATUTE OF LIMITATIONS.—Where there was a prior unrecorded deed from the mortgagor of which the mortgagee had no actual knowledge when parting with value, the mortgage being first recorded, the statute of limitations cannot begin to run in favor of the grantee, until his deed is recorded.

ID.—DECISION UPON FORMER APPEAL—FAILURE TO FIND UPON PLEA

OF STATUTE—LAW OF CASE INAPPLICABLE.—A decision upon a former appeal reversing the case for failure of the court to find upon the issue of a plea of the statute of limitations in favor of the grantee of the mortgagor, is not the law of the case, where the court finds upon a new trial upon sufficient evidence based upon appropriate allegations on the part of the mortgagee, of want of notice of the conveyance by the mortgagor, prior to the record thereof, that the action is not barred in favor of the grantee.

ID.—ARGUMENT UPON APPEAL—POINTS FIRST RAISED IN REPLY BRIEF—
WAIVER.—The court is at liberty to treat points for the appellant not raised in his opening brief, and raised for the first time in his reply brief as waived, where no good reason appears for such course, and it does not appear that appellant would be unjustly affected by the refusal of the court to consider them.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Frank H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

James H. Boyer, for Appellants.

Tobin & Tobin, for Respondent.

ANGELLOTTI, J.—This is an action to foreclose the lien of a mortgage executed on February 21, 1893, by Annie F. Lennon and her husband, James H. Lennon, to plaintiff, to secure the payment of a promissory note of the same date for four hundred dollars, and the interest that accrued thereon. The appeal is from the decree of foreclosure, which fixes the amount due, directs the sale of the mortgaged premises to pay such amount, costs, and expenses of sale, orders judgment against the administrator for any deficiency remaining after such sale, and bars and forecloses the defendants from the delivery of the commissioner's deed, of and from all equity of redemption and claim in said mortgaged premises. Boland having died, John Farnham has been appointed administrator of said estate, and substituted in place of Boland as defendant.

The note was due and payable, by its terms, one year after its date, that is, on February 21, 1894. The mortgage was acknowledged and certified so as to entitle it to be recorded, and it was recorded on February 23, 1893. Prior to the maturity of the note, and on or about March 29, 1893, said Annie F. Lennon died intestate. No proceeding for administration of her estate was commenced until the year 1900, when, on March 1, 1900, letters of administration of such estate were issued to P. Boland. Thereupon plaintiff presented for allowance the claim based on said mortgage, and the administrator having rejected the same, commenced this

action for foreclosure on May 10, 1900. Prior to the execution of said note and mortgage,—viz. on January 9, 1892, said Annie F. Lennon had executed and delivered to said James H. Lennon a deed conveying to him the property covered by the mortgage, and on January 27, 1900, said J. H. Lennon executed and delivered to defendant James H. Boyer a deed of the same property. Neither of these deeds was recorded until January 31, 1900, when they were placed on record. Plaintiff had no knowledge or notice whatever of such deed from Annie F. Lennon to James H. Lennon or the deed from James H. Lennon to James H. Boyer, or that either of them ever claimed any interest in the property, until the date of such recordation. The record in this action establishes that at the time of the execution of the note and mortgage, the mortgaged property was, except for the deed of January 9, 1892, the separate property of Annie F. Lennon, and the title stood of record in her name until January 31, 1900. J. H. Lennon's only interest in such property was such as he acquired by said deed of January 9, 1892. The foregoing facts were alleged in the amended complaint and are established by the findings of the trial court. The defendants demurred to such complaint on the ground that the alleged cause of action was barred by the provisions of section 337, of the Code of Civil Procedure, and their demurrer having been overruled, pleaded such section as a defense in their answer. The trial court further found that said action is not barred by the provisions of any statute of limitations.

No claim is made by defendants that the action is barred as to the estate of Annie F. Lennon, the rule being well settled in this state that the statute of limitations does not begin to run when no administration exists on the decedent's estate at the time the cause of action accrued. (*Smith v. Hall*, 19 Cal. 85; *In re Bullard* 116 Cal. 355, [48 Pac. 219].) As against the estate, the statute of limitations did not begin to run until the issuance of letters of administration, March 1, 1900, and this action was commenced May 10, 1900. So far as the estate was concerned, therefore, the judgment was clearly correct.

1. It is insisted that, on the admitted facts, plaintiff's cause of action is barred by the statute of limitations as to

the defendant Boyer, whose rights in the property are based solely on the deed of conveyance made by J. H. Lennon to him in January, 1900.

The statute providing that an action upon any contract in writing executed in this state must be brought within four years from the time the cause of action accrues (Code Civ. Proc., sec. 337), there can be no doubt that defendants' claim that plaintiff's cause of action against J. H. Lennon as a joint maker of the note and a co-mortgagor with Annie F. Lennon became barred on February 21, 1898, is well founded. But this is an immaterial matter in this case. No recovery was sought or given against J. H. Lennon or his grantee, Boyer, based upon any liability of said Lennon as a maker of the note or mortgagor. They were made parties defendant solely upon the theory that they were subsequent grantees, claiming under a conveyance from the mortgagor, Annie F. Lennon, recorded subsequent to the recording of plaintiff's mortgage and prior to the commencement of action to foreclose the same, the sole object being to foreclose their rights under such conveyance. At the trial, the action was dismissed as to said J. H. Lennon, because of his conveyance to Boyer and the fact that he no longer claimed any interest in the property. If he had not conveyed the property and had remained a party defendant, the effect of the statute of limitations, if pleaded by him, would have been simply to protect him against personal judgment for any deficiency remaining due after sale of the premises, unless the plaintiff's cause of action against him as a subsequent grantee was barred by the statute. And whatever protection the statute of limitations would have afforded him, purely as a subsequent grantee, his successors in interest are also entitled to. But they are entitled to nothing more.

Section 1214 of the Civil Code provides: "Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of the action." The term "conveyance" as used in this section, embraces every instrument

in writing by which any estate or interest in real property is created, aliened, mortgaged or encumbered (Civ. Code, sec. 1215). Under the plain terms of section 1214 of the Civil Code, the conveyance of January 9, 1892, by Annie F. Lennon to James H. Lennon, which was not recorded until the year 1900, was void as against plaintiff's mortgage, recorded February 23, 1893, plaintiff being as the findings establish, a mortgagee in good faith and for a valuable consideration. Such invalidity of the conveyance as to plaintiff continued certainly until it had notice thereof, which was not until the date of its record, January 31, 1900. In view of the explicit language of section 1214 of the Civil Code, the utmost that Boyer can reasonably claim is that the conveyance to James H. Lennon became effectual so far as plaintiff's mortgage was concerned on the day when such conveyance was recorded, plaintiff not having acquired actual knowledge thereof before such record. Then, if at all, he became a subsequent grantee, and the statute of limitations commenced to run in his favor as such. A conclusion that would import validity to such a conveyance, as against such mortgagee, prior to actual knowledge of the mortgagee thereof and prior to recordation would be in the very teeth of the statute. The case of *Filipini v. Trobock*, 134 Cal. 441, [66 Pac. 587], is authority for the proposition that the recording of such conveyance from Annie F. Lennon on January 31, 1900, gave to it, as against the mortgagee, who had no prior actual notice thereof, the effect of a conveyance executed by the grantor on that day. Speaking of a deed executed prior to the mortgage, and recorded thereafter, the court said: "But we think there can be as little doubt that after she had recorded the deed from Antonio to her deceased husband, her position as successor to her husband became, and continued to be, no better and no worse than if the deed had been made the day it was recorded. By recording the deed she gave the same notice to the mortgagee of her rights that would have been given by the record of a deed of that date to her, or to any other person, and whatever rights accrued to any purchaser of mortgaged premises by the recording of his deed accrued to her." The opinion in this case clearly indicates the conclusion compelled by the express terms of section 1214 of the Civil Code,—viz. that the statute of limitations

cannot begin to run in favor of one claiming under an unrecorded conveyance as against a mortgage given subsequent to the execution and delivery of the conveyance, for a valuable consideration, which is first duly recorded, in the absence of actual notice of such conveyance to the holder of the mortgage, until such conveyance is recorded. We are, of course, not speaking of a case where the cause of action for the debt secured is barred as to the debtor, but only of a case where the cause of action is not barred as to the debtor, in this case Annie F. Lennon, and the protection of the statute is sought by one whose only claim is ownership of the land subject to the mortgage, under a conveyance executed by such debtor prior to the mortgage. In such a case, actual notice of his claim or the constructive notice afforded by the recording of his conveyance or other instrument forming the basis thereof, is essential to bring him within the rule of *Wood v. Goodfellow*, 43 Cal. 185; *Watt v. Wright*, 66 Cal. 202, [5 Pac. 91]; *Filipini v. Trobock*, 134 Cal. 441, [66 Pac. 587]; *Brandenstein v. Johnson*, 140 Cal. 29, [73 Pac. 744]; *Vandall v. Teague*, 142 Cal. 471, [76 Pac. 135], and *California Title Ins. etc. Co. v. Miller*, 3 Cal. App. 54, [84 Pac. 453]. We are satisfied that the action was not barred by the statute as against Boyer. We have discussed this question upon the assumption that the general finding that the cause of action was not barred is a mere conclusion based on the specific facts found, which fully dispose of the issues as to the statute raised by defendants' answer.

2. Defendant Boyer contends that the doctrine of the law of the case is applicable on the question of the statute of limitations, and requires a ruling in his favor thereon. This contention is based on a decision of this court on a former appeal in this case from a judgment against him. (*Hibernia etc. Soc. v. Boland*, 145 Cal. 626, [79 Pac. 365].) The judgment against Boyer was there reversed for the reason that there was no finding upon his plea of the statute of limitations, "nor of facts from which such finding may be inferred." It was said that a finding in plaintiff's favor on sufficient evidence upon the issue of the statute would have been sufficient to support the judgment. The all-important distinction between that appeal and this is that we now have findings, based on appropriate allegations of the amended complaint, of want

of notice on the part of plaintiff of the conveyance from Annie F. Lennon to James H. Lennon until the date of its recordation, January 31, 1900, a date within three months of the commencement of this action. This was essential under section 1214 of the Civil Code to meet the plea of the statute, and this element was lacking in the facts found by the trial court on the former trial. The former decision, therefore, does not assist Boyer on this appeal.

These are the only points made for reversal in the opening brief of defendants. Some additional points are made for the first time in their closing brief. We are not disposed to look with favor upon a point so made, unless good reason appears for the failure to make it in the opening brief. This practice is not fair to a respondent, and tends to delay the final disposition of appeals. This court has heretofore said, that while it is undoubtedly at liberty to decide a case upon any points that its proper disposition may seem to require, whether taken by counsel or not, an appellant should, under the rules, make the points on which he relies in his opening brief, and not reserve them for his reply, and that the court may properly consider them as waived unless so made. (*Webber v. Clarke*, 74 Cal. 11, [15 Pac. 431]; *Phelps v. Mayer*, 126 Cal. 549, [58 Pac. 1048].) This should undoubtedly be the rule where no good reason appears for the omission to make the point in the opening brief, and it does not appear that the appellant would be unjustly affected by a refusal to consider it. We think that it is properly applicable here. One of the points so made is that the evidence is insufficient to support the finding that the plaintiff was without notice of the prior deed from Annie F. Lennon to J. H. Lennon at the time it took the mortgage and loaned the money secured thereby, and that the trial court improperly refused to strike out certain evidence given on behalf of plaintiff on that issue. It is true, as contended by defendants, that the burden of proof was on plaintiff to show the negative fact of want of notice (*Bell v. Pleasant*, 145 Cal. 410, 413, [104 Am. St. Rep. 61, 78 Pac. 957], and cases there cited), and it is also true that the evidence on this point is not as full and complete as it might have been. But there was competent evidence showing want of notice on the part of officers of plaintiff having to do with the passing of the title and the paying to

the mortgagors of the money loaned, and there was no pretense of an attempt on the part of the defendants to show knowledge by or notice to any officer or employee of plaintiff of the unrecorded conveyance. The record is such as to make it practically certain that there was no knowledge by plaintiff of the unrecorded conveyance until it was placed of record, and this is so even if the incompetent evidence quoted in the closing brief be disregarded. Under these circumstances, we believe the objections should be considered as waived by the failure of defendants to make them in their opening brief. The other point so made was that the court failed to specifically find on the issue raised by the denial of the allegations that James H. Lennon "joined in the execution of said note and mortgage as the husband of said Annie F. Lennon, solely, and not as the owner of any interest in said real property." It is sufficient to say that the findings on other issues fully cover this matter.

The judgment is affirmed.

Shaw, J., and Sloss, J., concurred.

Hearing in Bank denied.

[L. A. Nos. 2132, 2139. In Bank.—May 15, 1908.]

GERMAIN FRUIT COMPANY, Appellant and Respondent,
v. J. K. ARMSBY COMPANY, Respondent and
Appellant.

SALE OF DRIED FRUIT BY SAMPLE—SHIPMENT OF QUANTITY EAST—BREACH OF WARRANTY—TIME OF DISCOVERY—MEASURE OF DAMAGES.—The measure of damages for a breach of warranty upon a sale of dried fruit by sample, upon shipment to an eastern market, is deemed to be the excess, if any, of the value which the property would have had, at the time to which the warranty referred, if it had been complied with, over its actual value at the time when the breach was discovered, or should reasonably have been discovered, which could not have been expected to occur until the boxes of fruit reached the place to which they were shipped.

ID.—APPEAL FROM JUDGMENT BY PLAINTIFF—PLEADING AND FINDINGS—UNNECESSARY DIVISION OF DAMAGES—ACTUAL LOSS—LOSS OF PROFITS.—Upon appeal from the judgment by the plaintiff, where

the difference in value appears from the complaint and findings, the segregation of that difference therein into "actual loss," and "loss of profits on resale," was unnecessary under the statute, and when so segregated, it was error for the court to allow only the "actual loss," and to disallow the "loss of profits on resale" as part of the general damages.

ID.—PLEADING—GENERAL DAMAGES—SPECIAL PLEADING OF LOSS OF PROFITS UNNECESSARY.—The damages sued for may all be recovered as general damages; and it was not necessary for plaintiff to plead specially how the loss of profits on resale arose.

ID.—DEFENDANT'S APPEAL—FINDING OF WARRANTY AGAINST EVIDENCE—WRITTEN CONTRACT—PAROL EVIDENCE—NEW TERM OF CONTRACT.—*Held*, on appeal by defendant, that the finding that there was a warranty of quality upon sale by sample is against the evidence, showing that the contract of sale was in writing and is silent on that subject. Parol evidence, though admissible to explain an ambiguity in description of the property sold and to identify the same, is not admissible to introduce any new term into the contract, importing quality or warranty, not included in the meaning of any term used therein.

ID.—IMPORT OF WORD "LOT"—DESCRIPTION.—The use of the word "lot" in the contract, to indicate "lot A," "lot K," "lot C," and "lot E," each containing a different number of boxes of apricots, is expression of description, and not of quality or warranty.

APPEALS by plaintiff from a judgment of the Superior Court of Los Angeles County, and from an order refusing to vacate the judgment, and to increase the amount thereof, and cross-appeal by defendant from the whole of said judgment and from an order denying new trial. N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

Herbert Cutler Brown, for Plaintiff, Appellant in L. A. No. 2132, and Respondent in L. A. No. 2139.

Max Loewenthal, for Defendant, Respondent in L. A. No. 2132, and Appellant in L. A. No. 2139.

THE COURT.—The appeals in this case, of which there are two, were originally presented to the district court of appeal for the second appellate district, but the judges thereof being unable to agree in a judgment therein, the appeals were ordered to this court for disposition. Accompanying such order are the opinions filed by the respective judges of the district court of appeal. One of said opinions is as follows:—

"Judgment was for plaintiff and both parties appeal. In view of the conclusion reached and the order made it is deemed advisable to consider the two appeals together.

"Plaintiff's appeal (No. 149) is from an order denying its motion to vacate and set aside the judgment in the cause and to enter a different judgment, increasing the amount thereof. Defendant's appeal No. 154 is from the whole judgment and from an order denying its motion for a new trial.

"The action was brought to recover damages for breach of warranty of quality of dried apricots sold by defendant to plaintiff. The damages claimed (\$1748.22) were alleged in the amended complaint to be \$1126.47 for the loss actually sustained by the breach complained of, and \$621.75, profits which plaintiff alleges it would have made if the goods had been as warranted. The contract between the parties, which was reduced to writing, was silent as to any warranty of the goods, but parol evidence was admitted by the court, on behalf of plaintiff, for the purpose of establishing that the sale was made upon an express warranty by sample. It is claimed by defendant that this was error, and that the findings upon which the judgment is based are unsupported without this parol evidence.

"The findings material here show: The plaintiff purchased a lot of dried apricots from defendant to be resold in the markets in cities east of the Rocky Mountains; the defendant knowing such purpose, warranted said fruit to be according to certain samples delivered to plaintiff; the fruit was in Pomona and the sale took place in Los Angeles and plaintiff relied upon such samples for quality and weight (the number of boxes being given) and had no opportunity to inspect the bulk of the fruit; plaintiff paid to defendant the full amount of the purchase price, to wit: \$4352.25, and delivery for shipment was made f. o. b. cars at Pomona, as agreed; plaintiff, without examination, shipped the fruit to the city of Philadelphia for sale, where its representative, on inspection, discovered it to be inferior in quality to the samples shown, and light in weight; after notice to defendant and the refusal of the latter to take any action in the matter, plaintiff sold the apricots in the market at Philadelphia for \$3225.78 over and above the freight and usual and necessary expenses

of making the sale, which was the best price obtainable for such apricots. Had the apricots been of the quality of the samples exhibited to plaintiff they could and would have been sold by it in Philadelphia for the sum of \$4974, in excess of freight and expenses of sale. As an inference from these facts, the court finds that by reason of such breach of warranty plaintiff has been damaged in the sum of \$1748.22; \$1126.47 being actual loss and \$621.75 being the profits which would have been made on resale if the apricots had been as warranted. Judgment is then given for \$1126.47 and denied as to the \$621.75, profits. Argumentatively, and as a conclusion of law based on specific findings made, the reason for not including the 'profits' in the judgment is stated by the court in its findings to be 'that defendant did not have notice that plaintiff intended to sell said apricots in any specific market, or at any definite price.' Plaintiff claims that on the findings of fact made it was entitled to a judgment for \$1748.22.

"Plaintiff's Appeal No. 149.

"Considering first the plaintiff's appeal (No. 149) which involves but one question and must be determined from the judgment-roll, we are of the opinion that the segregation of the damages into actual loss and profits in such a case as this is not necessary under the statute. 'Speculative' profits are one thing and that portion of the price of goods having an actual value in the market above what was paid for them is another. The goods delivered in Philadelphia were actually worth only \$3225.78 over and above freight and expenses of sale. Had they been according to sample they would have been of the value of \$4974 over freight and expenses at the same place. That is, the same quantity of apricots purchased by plaintiff of defendant of the quality of the samples shown were actually worth \$4974 in Philadelphia at the time the ones delivered to plaintiff by defendant were sold for the smaller sum named. There is nothing 'speculative' about these differences of value. The findings to this effect are express, and may be considered independent of the finding upon the theory of a resale which also fixes the last-mentioned value at the same amount (\$4974) for that purpose.

"Defendant sold goods to plaintiff which it knew the latter would have no opportunity to inspect until they reached some

eastern market. The court finds Philadelphia to be one of the places that must be included in the term 'eastern market.' The inspection at that place disclosed goods worth \$3225.78, instead of \$4974. The reason for the difference was the failure and breach of defendant's warranty. If there had been any element of special additional damage by reason of plaintiff's inability to make good some contract of sale made by it, at the time of, or prior to, the purchase from defendant, and the fulfillment of such contract had been dependent upon the goods being up to sample, notice to defendant of such special sale at a definite price would have been necessary in order to hold it for such special damages. No damages are asked here for profits on a contract for resale at an advanced price.

"Damages for breach of an obligation are measured by the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things will be likely to result therefrom. (Civ. Code, sec. 3300.)

"The detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time.' (Civ. Code, sec. 3313.)

"The cases cited by both parties relating to the interference with, discontinuance of, or destruction of a business, or the prevention of one from pursuing a vocation, and dealing with the question of what profits are too remote, or speculative or uncertain to be included in an action for damages for such interference or destruction, only indirectly aid in solving the question here under consideration and are to be distinguished from this case.

"In *Hughes v. Bray*, 60 Cal. 284, an instruction to a jury was sustained which uses the following language: 'You should ascertain . . . what portion of the barley delivered, if any, was of an inferior quality, and in the second place you should award to the plaintiff the difference between the market value of such portion, and the market value of an equal quantity of barley of the same quality as the sample, at the time of delivery.'

"In *Shearer v. Park Nursery Co.*, 103 Cal. 415, [42 Am. St. Rep. 125, 37 Pac. 412], the time of the breach of warranty was held to mean the time at which the breach was discovered, or, with ordinary care and attention might have been discovered by the purchaser. That is, at the time at which, under the circumstances of the case, it reasonably should have been discovered. In the case at bar this could not have been expected to occur until the goods reached the place to which they were shipped.

"The same rule has been applied in this state in case of an implied warranty, under section 1771 of the Civil Code, that merchandise inaccessible to the examination of the buyer is warranted to be merchantable. (*Silberhorn v. Whcaton*, (Cal.) 51 Pac. 689.) If the opinion in *English v. Spokane Com. Co.*, 57 Fed. 451, [6 C. C. A. 416], be in conflict with this, it must give way to the local authority decided under our statute. But, I think the same rule of damages is declared in that case, and the same distinction made as to 'profits on resale.' The rule adopted in *English v. Spokane* is from Schouler's Personal Property, and is quoted as follows: 'The measure of damages recoverable for breach of warranty of quality is, in general, the difference in value between the article actually furnished and that which should have been furnished under the contract at the time and place agreed upon. . . . The rule of damages for breach of warranty is the difference between the sound value of the thing as warranted and its actual value.' The federal court, in considering the place at which the value was to be ascertained, says: 'As the sale was made at Omaha and the goods were to be delivered at Spokane, the defendant was entitled to recover the difference between the contract price and the value of the goods in the market at Spokane at the time of the delivery.' The place of delivery being the same as the place of inspection and resale, there was no reason for the application of the rule declared in *Shearer v. Park Nursery Co.*, 103 Cal. 415, [42 Am. St. Rep. 125, 37 Pac. 412].

"The damages which plaintiff sues for in this case may all be recovered as general damages, and it is not necessary that the 'profits' be specially alleged. (*Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 249, [41 Pac. 1020].) As the conclusion reached on defendant's appeal will require a new

trial of the case, it is not necessary for us to consider whether or not the amended complaint and the findings of fact would support the judgment here indicated as proper on the case made. The foregoing opinion will suffice to guide the parties as to all matters affected by this appeal, if a new trial be had.

"By the opinion filed in appeal No. 154, it being held that the evidence was insufficient to support the findings made in the case, it would be idle to make an order overruling the trial court's action in denying plaintiff's motion. This appeal, therefore, must be governed by the order made in No. 154.

"Defendant's Appeal No. 154.

"The real question to be determined on this appeal relates to the admissibility of the parol evidence to affect the terms of the writing executed by the parties at the time said dried apricots were sold. This writing was as follows:—

"LOS ANGELES, CAL., Oct. 19, 1901.

"This agreement made by and between the J. K. Armsby Co., and the Germain Fruit Company, Witnesseth:

"That the said J. K. Armsby Co. has this day sold and the said Germain Fruit Company has this day bought twenty-five hundred boxes apricots, more or less, consisting of:

| | |
|-----------------|------------|
| "Lot 'A,' | 287 boxes |
| "Lot 'K,' | 104 boxes |
| "Lot 'C,' | 1400 boxes |
| "Lot 'E,' | 715 boxes |

at seven (7) cents per pound plus one per cent net cash f. o. b. cars at Pomona, on surrender of bill of lading; shipment to be made during the month of October, 1901.

"Signed in duplicate.

"THE J. K. ARMSBY COMPANY,

"By A. B. MINER.

"GERMAIN FRUIT COMPANY,

"By EUGENE GERMAIN."

"Measured by the criterion that the completeness of a written contract, as a full expression of the parties, is the writing itself, the writing appears upon its face to contain all the necessary elements of a complete contract of sale. The de-

scription of the property sold is admittedly incorrect and it contains no express warranty of quality of the goods sold, but contracts of sale may be complete without the latter.

"The contract calls for apricots, while the evidence shows and both parties admit that *dried* apricots were the subject of the agreement. It is conceded that this defect of description may be supplied by parol. Respondent contends that the same rule warrants the introduction of parol evidence to determine what apricots were intended to be described by lot 'A,' lot 'K,' lot 'C,' and lot 'E,' and also to identify them by sample. There is no question as to the former proposition, and in a proper case and under proper circumstances the latter would no doubt be true. For instance, if the fruit itself, the label on the box, the package, or the method of packing were peculiar, or so different in character from other fruit or packages of dried apricots, as generally prepared for market, that the sample box would serve to identify or aid in identifying the goods from which the box was taken, such evidence might be admissible for the purpose of identifying the subject-matter of the written contract. 'Lot A, 287 boxes,' does not so clearly describe the goods sold as to preclude the admission of evidence for purposes of identification, if necessary. (*Ontario D. F. G. Assoc. v. Cutting F. P. Co.*, 134 Cal. 21, [86 Am. St. Rep. 231, 66 Pac. 28].)

"No effort, however, was made to show such circumstances as would warrant the introduction of the samples or the testimony in relation thereto upon this theory. If the facts had been such as to make the evidence proper upon this theory alone, the purpose of its introduction should have been limited so as to exclude its consideration in connection with the question of warranty of quality. On the contrary, the very purpose of its introduction was apparently to add to the written contract of sale another term, a parol warranty of quality by sample.

"The court permitted the introduction of parol evidence as to sample and applied it on the theory that it was competent proof of a warranty. It expressly found such a warranty, and the judgment for damages rests upon its breach. There is no other evidence to support the finding, except the inferences to be drawn from plaintiff's exhibit 5. This was a receipted bill showing on its face words and figures, which

taken with plaintiff's explanation of them served to corroborate plaintiff's testimony that the sale was made by sample. Alone, it was insufficient as evidence in writing to justify a finding to that effect. The finding and judgment therefore rest on the parol evidence.

"It is urged by respondent in support of the court's action, that an ambiguity or uncertainty appearing in the language of the instrument by the use of the terms 'Lot A, 287 boxes,' etc., the matter is open for explanation by parol evidence; and, that such ambiguity or uncertainty may as well be removed by showing the term was intended to mean 'according to sample A,' as by showing that it was intended to mean some certain pile of 287 boxes marked 'A,' or designated as 'A' in some other manner for purposes of description or identification. In other words, that the term being ambiguous there is no good reason why such ambiguity may not be resolved upon the assumption of an ambiguity in expressing the warranty as well as upon the theory of an ambiguity in description. There is much weight in this contention. We must, however, bear in mind that the law permits no new term to be introduced into a written contract by parol, while it does permit such evidence for the purpose of making certain an ambiguous description or for purposes of identification.

"To hold that the words, 'Lot A, 287 boxes,' considered either in their ordinary use or as used in a commercial way, relate to warranty rather than identification would do violence to the use of language. It would amount to what the rule does not permit even in cases of description, the supplying by parol of something not expressed in the instrument in any manner. Neither the grammatical construction of the language used in the contract nor the definition given to the word 'lot' by the lexicographers justifies attributing to it a meaning which imports quality or warranty.

"While from the parol evidence introduced the inference may be drawn that the parties intended the sale should be on a warranty by sample, we cannot permit any bias or knowledge of the fact to lend weight to the construction of the instrument. Admitting that such was the intention, an examination of the writing shows that if this were the case there was an entire failure to embody such intention in the

contract. The language used was unfit and inappropriate to express a warranty of quality by sample or otherwise, being language importing description and identity only. 'Lot' is not an ambiguous word of warranty, but a word used solely to describe and identify. All definitions of the word display its derivation from 'share, portion or parcel.' (See Century Dictionary.)

"There are well-considered cases holding that an express warranty can be proven by parol evidence where the contract of sale is silent in this respect. The decisions in these cases are based upon the principle that a warranty is not one of the essential elements of a sale, but is a mere collateral undertaking. (*Chapin v. Dobson*, 78 N. Y. 74, [34 Am. Dec. 512].)

"This view, however, is not in harmony with the cases upon which the latest declarations of the law on this subject by our supreme court rest. In *Thompson v. Libby*, 34 Minn. 377, [26 N. W. 2], it is said: 'When made, a warranty is a part of the contract of sale. The common sense of men would say, and correctly so, that when, on a sale of personal property a warranty is given, it is one of the terms of the sale and not a separate and independent contract.' To justify the admission of parol evidence on the ground that it is collateral, it must relate to a subject distinct from that to which the writing relates.

"Where the written sale contains no warranty or expresses the warranty that is given by the vendor, parol evidence is inadmissible to prove the existence of the warranty in the former case or to extend it in the latter. (*Johnson v. Powers*, 65 Cal. 181, [3 Pac. 625]; citing Benjamin on Sales, 621.)

"If it (the writing) imports on its face to be a complete expression of the whole agreement,—that is, contains such language as imports a complete legal obligation,—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which parol evidence is directed. The rule forbids to add by parol when the writing is silent, as well as to vary where it speaks.' (*Harrison v. McCormick*, 89 Cal. 330, [23 Am. St. Rep. 469, 26 Pac. 830]; citing *Thompson v. Libby*, 34 Minn. 377, [26

N. W. 2]; and *Naumberg v. Young*, 44 N. J. L. 331, [43 Am. Rep. 380].)

"The effect and limitations of *Guidery v. Green*, 95 Cal. 630, [30 Pac. 786], and *Sivers v. Sivers*, 97 Cal. 518, [32 Pac. 571], and the cases citing them, have been clearly distinguished in *Bradford Inv. Co. v. Joost*, 117 Cal. 204, [48 Pac. 1083], and they are not authority here. (See, also, *Board of Education v. Grant*, 118 Cal. 44, [50 Pac. 5].)

"The rule declared in *Harrison v. McCormick* was affirmed in *Gardiner v. McDonogh*, 147 Cal. 313, [81 Pac. 964], and finds abundant support elsewhere. (*Wilson v. New U. S. Co.*, 73 Fed. 994, [20 C. C. A. 248]; *Union Selling Co. v. Jones*, 128 Fed. 672, [63 C. C. A. 224]; *Day Leather Co. v. Michigan Leather Co.*, 141 Mich. 533, [104 N. W. 797].)

"Even Mr. Wigmore, who in his work on Evidence argues most strenuously for an extension of the rule relating to the admission of parol evidence, so that, what he calls, 'all the terms of the contract,' may be considered by the court, recognizes a distinction in the application of the rule to the matter of warranty and its application to matters of description (secs. 2401, 2434, and 2465). We cannot help suggesting, however, that, in his discussion on this subject, Mr. Wigmore has not given sufficient weight to the possibility, or rather probability, that the extension urged might result in the admission not only of 'all the terms of the contract,' but some additional ones, and, in rare cases, might even result in removing from the written contract some of the most important terms that had been formally, carefully and intentionally put down therein. To hold parties to diligence and care in reducing their negotiations to writing, and to hold the writing to be subject to attack only by specific allegations of fraud or mistake, appears to be the better rule, and is now supported by the weight of authority. Like the statute of frauds, this rule is founded upon long and convincing experience that written evidence is more certain and accurate than 'slippery memory.' So long as the rule is applied, the actual contract made can be preserved without fear of its being affected in its terms by the frailties of an interested human recollection. That sometimes the written contract does not include all the terms intended by reason of neglect or oversight, and injustice is thereby done in particular cases, does not justify the aban-

donment of the rule. To construe it away is to destroy one of the greatest barriers against fraud and perjury.

"Without specially indicating the rulings to which this opinion is applicable, it is sufficient to say that the admission of testimony to show a sale by sample for the purpose of establishing an express warranty of quality of the apricots sold was error. The finding of such a warranty was without competent evidence to sustain it, and the case was tried on an erroneous theory inconsistent with the rule declared in *Gardiner v. McDonogh*, 147 Cal. 313, [81 Pac. 964].

"The other points made by appellant on this appeal need not be considered further than they come within the reasoning in appeal No. 149."

We are satisfied that the foregoing opinion correctly states the law applicable to the points presented on both appeals, and we adopt it as the opinion of this court.

The judgment and order appealed from are reversed.

SHAW, J.—I concur in the judgment, on the authority of the decision in *Gardiner v. McDonogh*, 147 Cal. 313, [81 Pac. 964]. I do not agree to all that is said in the opinion adopted by the court, as I understand it. I can conceive of a sale of goods in bulk, of varying quality, in which the different qualities might be represented by samples shown to the purchaser, the goods being absent, and in which an estimate would be made by the seller of the quantities of each kind comprised in the whole bulk corresponding to the samples shown, the samples being marked as "lot A," "lot B," etc. In such a case a writing, such as that here in question, purporting to agree to sell "500 boxes lot A, and 600 boxes lot B," if construed with reference to the circumstances attending its execution, would properly be held to mean that a sale was made of 500 boxes of the quality of the sample marked as lot A and 600 boxes of the quality of the sample marked as lot B. Such evidence would, in my opinion, be competent to point the meaning of the writing. I do not believe that the opinion intends to express anything contrary to this, but I think some of its language might be so understood. The evidence admitted by the court below and here held incompetent, however, shows a mere sale by sample and, according to that evidence, the designations "lot A," etc., refer to certain

lots stored in a warehouse and not to the respective samples exhibited to the purchaser. The case falls precisely within the rule established in *Gardiner v. McDonogh*, which is now to be considered as the settled rule of this court.

[S. F. No. 4929. In Bank.—May 15, 1908.]

**M. H. DIEPENBROCK, Petitioner, v. SUPERIOR COURT
OF THE COUNTY OF SACRAMENTO, Respondent.**

LEGAL HOLIDAYS—CONSTITUTIONAL LAW—TRANSACTION OF JUDICIAL BUSINESS.—Section 5 of article VI of the constitution, declaring that the superior courts of the state "shall be always open (legal holidays and non-judicial days excepted)," but "injunctions and writs of prohibition may be issued and served on legal holidays and non-judicial days,"—authorizes the legislature to allow or disallow the transaction of all or any class of judicial business upon legal holidays, by an act not in itself obnoxious to other restrictions of the constitution.

ID.—SPECIAL HOLIDAYS—AMENDMENT OF 1907 TO SECTION 135 OF CODE OF CIVIL PROCEDURE UNCONSTITUTIONAL.—That portion of the amendment of section 135 of the Code of Civil Procedure, enacted at the special session of the legislature on November 23, 1907, and providing that on all "special holidays" declared by the governor of the state, the courts shall be open for the transaction of all judicial business "except the trial of an action or the rendition of a judgment based upon a contract, expressed or implied, for the direct payment of money," is unconstitutional in that it confers a special privilege upon a class, not founded upon any constitutional, rational, or legal distinction. The exception is so integral a portion of the statute as to render the entire amendment void.

APPLICATION for a Writ of Prohibition directed to the Superior Court of Sacramento County. Peter J. Shields, Judge.

The facts are stated in the opinion of the court.

R. Platnauer, and Grove L. Johnson, for Petitioner.

L. T. Hatfield, V. L. Hatfield, and W. H. Hatfield, *Amici Curiae*, for Petitioner.

Cushing, Grant & Cushing, *Amici Curiae*, on petition for rehearing.

C. E. McLaughlin, A. L. Shinn, C. B. Harris, and C. O. Busick, for Respondent.

HENSHAW, J.—This is an application for a writ of prohibition, the purpose of which is to have determined the validity of section 135 of the Code of Civil Procedure as amended on November 27, 1907 (Stats. 1907, p. 681).

Section 5 of Article VI, of the constitution declares that the superior courts of this state “shall be always open (legal holidays and non-judicial days excepted)” but “injunctions and writs of prohibition may be issued and served on legal holidays and non-judicial days.”

Holidays were defined by the codes and were declared, besides certain enumerated days, to be “every day appointed by the president of the United States or by the governor of this state for a public fast, thanksgiving or holiday.”

It was then declared by section 133 of the Code of Civil Procedure, that courts of justice may be held and judicial business transacted on any day excepting as provided in the next section. Section 134 of the Code of Civil Procedure, then provided as follows:—

“No court, other than the supreme court, must be open for the transaction of judicial business on any of the holidays mentioned in section ten, except for the following purposes:

“1. To give, upon their request, instructions to jury when deliberating on their verdict;

“2. To receive a verdict or discharge a jury;

“3. For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature.

“Injunctions and writs of prohibition may be issued and served on any day.”

It will be noted that the language above quoted empowers the courts on holidays to transact business other than that designated by the constitution. But, to the objection that the constitution prohibited all business in the superior court on a legal holiday or non-judicial day, except the issuance of injunctions and writs of prohibition, this court long since answered that the constitution did not contemplate such a

result, but "leaves the legislature at liberty to allow or disallow the transaction of all or any class of judicial business upon legal holidays." (*People v. Soto*, 65 Cal. 621, [4 Pac. 664]; *Ex parte Smith*, 152 Cal. 566, [93 Pac. 191].)

Such was the condition of the law when the legislature was called together in extraordinary session in the autumn of 1907. The legislature was convened principally for the purpose of devising some measure of relief from the effects of the financial panic which the state was then undergoing. A year and a half previously, in the spring of 1906, following the San Francisco disaster, it had seemed necessary to the governor to declare holidays until such time as affairs again resumed something of their normal condition. Necessary and beneficial upon the whole, it was universally recognized that the state at large suffered no little inconvenience from the interruption to judicial business enforced under the law by the declaration of these holidays. Again, in the autumn of 1907, owing to the financial crisis through which the state was passing, it had been deemed necessary by the governor to declare a series of holidays. And, again, as against the compensating good, it was recognized that hardship resulted from the general suspension of the judicial business of the superior courts. It was under these circumstances that the legislature undertook the commendable task of preserving the benefits and advantages of such holidays, while minimizing their evils. To accomplish this result, it amended section 10 of the Code of Civil Procedure relating to holidays, adding to the language of section 10 above quoted, that holidays, besides those enumerated in the section as it originally stood, should be "such days as the governor may declare as special holidays." Then proceeding with the consideration of these special holidays, the section declared, "that the governor of the state may declare special holidays, and he may in one proclamation designate one or any number of consecutive days as special holidays, and during any such special holidays no public duty shall be suspended or prohibited except such as affect the administration of justice in the courts of this state as prescribed by section 135 of this code for the control of such courts." Section 135 of the Code of Civil Procedure was then amended by adding to it this new matter: "On all special holidays the courts of this state shall be open for

the transaction of any and all judicial business except the trial of an action or the rendition of a judgment based upon a contract, expressed or implied, for the direct payment of money."

In the briefs of counsel much consideration is paid to the question as to whether or not it is within the power of the legislature, by calling a holiday a "special" holiday, to clothe it with characteristics, privileges, and immunities which do not pertain to a "general" holiday. It is argued that to permit this is to permit an evasion of the constitution which speaks of holidays, and which, so speaking, must mean all holidays, special as well as general; that the essential distinction, and the only essential distinction, which can exist between a special holiday and a general holiday, is found in the nature of their creation, but that when once created both stand upon the same plane, with equal footing. A general holiday, it is thus said, is a day set apart and declared to be such by the legislature itself, notice being carried to all the world by the statute that such particular day has been set apart for rest, recreation, fasting, thanksgiving, public rejoicing, public mourning, or any of the other legitimate purposes for which such a day may be decreed; upon the other hand, that a special holiday is special only in the sense that it is not a recurring anniversary, but is created from time to time by the declaration of the chief executive when occasion seems to call for it. But we need not here determine this question upon the broad lines of its presentation, for we think that conceding that the legislature has the power to make a distinction in some of their attributes and characteristics between a general holiday and that which they have designated a special holiday, nevertheless the particular difference, distinction, and limitation which they have here made, affecting the courts of justice and the administration of justice, is special legislation which cannot be upheld. When this court in *People v. Soto*, 65 Cal. 621, [4 Pac. 664], declared that the legislature was at liberty to allow or disallow the transaction of all or any class of judicial business upon legal holidays, it meant no more, and could have meant no more, than that the legislature could authorize the transaction of any class of business which was not in itself obnoxious to the dictates of the constitution. Up to that time the exceptions as to writs

of prohibition and injunctions, while special in their nature, were classes designated by the constitution itself, and therefore not to be questioned. In all other respects the purposes enumerated in section 134 of the Code of Civil Procedure, for which judicial business could be transacted upon a holiday, were purposes which, while falling into classes, fell into classes carrying, from the very reading of their designation, the reason for their existence and the generality and uniformity of their operations. To give instructions to a jury when deliberating on their verdict, meant instructions to any jury so deliberating, to facilitate their deliberations and bring their labors to a close. To receive a verdict or discharge a jury was to receive the verdict of and discharge any jury, that the members composing it might not be unnecessarily and unduly restrained and confined. To exercise the powers of a magistrate in a criminal action or proceeding of a criminal nature, are general provisions tending to the speedy administration of the criminal laws in the interest of the commonwealth.

But, for the first time, by the amendment of section 135 is the effort made to designate one class of litigants, and to say to them, "While the courts of this state are open to all other suitors, their doors are closed to you." It matters not whether the legislature should attempt to do this directly by virtue of its own statutory enactment, or indirectly by empowering the chief executive to accomplish the same result through the medium of special holidays. If the legislature could not do this directly, it certainly could not accomplish the same result by indirection, and the proposition thus stated is: Can the legislature say that the courts of justice, for thirty days or sixty days or for any other period of time, while open to every other litigant in every kind and class of litigation, shall be closed to him who seeks the collection of money due upon a contract, or to him who seeks to recover damages for tort, or to him who seeks equitable as distinguished from legal relief, or, indeed, to any class as distinguished from another? Assuredly it will not be said that this may be done, unless there be some valid, legal reason for the class distinction and for the putting of the class so distinguished under this prohibitory ban. As to the exception under consideration it is, of course, apparent, recognized, and

admitted that the law was designed to protect the debtor class in times of great financial stringency. But can such extraordinary privilege to a debtor be justified under our law? It is to be noted that in thus favoring the debtor from the legal enforcement of his creditor's demand, read from the other and equally important point of view, it is a denial to the creditor of the right to enforce such demand. It cannot be a favor to one class without inflicting a corresponding injury upon the rights of another. The creditor of one man is frequently the debtor of another. In the multiplicity of the transactions of modern business, the creditor of a debtor residing in San Francisco may himself be the debtor of a resident of New York. Unable to enforce his collections from the local debtor, he stands liable to business disaster at the hands of his New York creditor. The class thus created by law is not a class owing its existence to any constitutional, rational, legal distinctions, which alone justify such classification, but the reason for its creation is personal as distinguished from governmental, and the plain object of the law is unduly to favor the debtor to the hardship of the creditor in times of financial stringency. Commendable as was the motive which prompted such legislation, it cannot be upheld.

We have stated that it is unnecessary to determine whether or not the legislature has the power to make a distinction in characteristics between a legal holiday and a special holiday, but we are brought to the question as to whether this determination which forbids closing the courts to the trial of an action based on contract for the direct payment of money does or does not render the whole amendment void. In other words, is the exception so integral a part of the statute as to lead to the conclusion that if the legislature had known it was void, it would not have enacted the amendment, or is it to be concluded that the exception may fall and the amendment stand, to the effect that the legislature has declared that upon special holidays the courts of the state shall be open for the transaction of any and all judicial business? Clearly the first view must obtain. The purpose of the enactment was to allow the judicial business of the state to proceed in all matters saving one. In deciding that that one may not be excluded, if it should be held that the section may still stand, is to declare that the legislature had enacted that on

all special holidays the courts of this state shall be open for the transaction of any and all judicial business without exception, an interpretation of a statute which it did not enact, and which is in irreconcilable variance with the result which it attempted to accomplish.

For which reasons it is held that the amendment to section 135 of the Code of Civil Procedure, approved November 23, 1907, is void.

In conclusion, then, we repeat, that it is not decided that the legislature may not make certain distinctions between general holidays and special holidays, but the distinction which here they sought to make being abortive and void, the law for the creation of special holidays itself fails. By this failure the days designated as special holidays were not transformed into general holidays and were not holidays at all, with the result that they became judicial days, upon which the functions of the courts of the state were in no respect suspended. (*Risser v. Superior Court*, 152 Cal. 531, [93 Pac. 85].)

It follows from the foregoing that petitioner is not entitled to his writ of prohibition, and his application therefor is denied.

Angellotti, J., Sloss, J., Lorigan, J., and Beatty, C. J., concurred.

Rehearing denied.

[S. F. No. 4720. In Bank.—May 19, 1908.]

In the Matter of the Estate of LYDIA C. WICKERSHAM, Deceased. LIZZIE C. MACLAY et al., Proponents of Will, Respondents; CORA L. WICKERSHAM et al., Contestants, Appellants.

WILLS—CONVEYANCE OF EXPECTANCY BY HEIR—AGREEMENT NOT TO CONTEST WILL—PLEADING—FAIRNESS—ADEQUACY OF CONSIDERATION—PUBLIC POLICY.—Though the general rule is, that where an heir conveys his expectancy in the estate of his ancestor, or agrees with other heirs before his ancestor's death, not to contest the

ancestor's will, such conveyance or agreement is deemed invalid, unless facts are pleaded and proved showing that the same was fairly obtained, and that the consideration was full and adequate; but, when such showing is made, the execution of such conveyance and agreement is not against public policy, but is valid and binding.

ID.—PETITION BY HEIRS OF DECEASED SON TO REVOKE PROBATE OF WILL

—SUFFICIENCY OF ANSWER — COMPROMISE AGREEMENT — FAIRNESS AND ADEQUACY.—Where the widow and child of a deceased son of

the testatrix, petitioned the court to revoke the probate of his mother's will, and the answer thereto set forth a compromise agreement between all parties interested, where the son was contesting his father's will, that he should dismiss the contest thereof, and agree not to contest his mother's will, and should assign and convey all of his interest in the estate of each, and set forth facts, showing a reasonably full and adequate consideration for the whole compromise agreement, moving from his father's estate, and from his mother personally, and that the son was fully advised of all the facts, and acted freely without coercion in the whole matter, *held*, that the son was barred and estopped from contesting the validity of his mother's will, and that the petitioners had no standing to revoke the probate thereof.

ID.—SUFFICIENCY OF PLEADING—DIRECT AVERMENT OF ADEQUACY OF

CONSIDERATION NOT ESSENTIAL.—The averment of adequacy of consideration is of a legal conclusion, and would not be sufficient, without setting forth the facts showing it; and the absence of such direct averment, will not vitiate the pleading, where sufficient facts are set forth to establish it.

ID.—RULE FOR CONSTRUCTION OF PLEADING—CODE RULE BINDING UPON

COURTS.—It has been often said that pleadings are to be construed most strongly against the pleader; but the true and accurate statement of the rule binding upon the courts, is that set forth in section 452 of the Code of Civil Procedure, that "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties."

ID.—POSTPONEMENT OF CONTEST—DISTRIBUTION OF ESTATE OF FATHER

OF DECEASED SON—DISCRETION.—The court has full discretion to refuse to postpone the contest raised by the petition to revoke the probate of the will of the mother of the deceased son, until the final distribution of the estate of his deceased father, where the facts show no abuse of discretion.

ID.—JURISDICTION TO TRY ISSUE OF ESTOPPEL—INTEREST IN ESTATE—

ORDER OF PROOF.—The court upon the hearing of the petition to revoke the probate of the will, had jurisdiction to try the issues of estoppel, and of the interest of the heirs of the deceased son in the estate of his deceased mother, and had power to control the order of proof and to require the contestants first to establish their interest.

ID.—PRODUCTION OF COMPROMISE CONTRACT—RECITALS PRIMA FACIE EVIDENCE.—Where the parties answering upon the issue of estoppel, rested upon the production of the compromise contract which set forth very fully the negotiations leading up thereto, and the consideration, purposes, and intention of the agreement, they were entitled to rely upon its recitals as *prima facie* evidence of all the facts necessary to give it validity and effect.

ID.—SUPPORT OF FINDINGS.—*Held*, that there is sufficient evidence to support the findings based upon the averments of the answer; and that findings must be sustained, where the evidence in relation thereto is substantially conflicting.

ID.—DECISION UPON APPEAL IN ESTATE OF DECEASED FATHER, NOT LAW OF CASE AS TO ESTATE OF DECEASED MOTHER.—The decision upon a former appeal as to the interest of the son in the estate of his deceased father, is not the law of the case as to his right of inheritance from his mother, which was not involved, and could not be adjudicated upon that appeal; nor could any remarks in that opinion on that subject, constitute the law of this case.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Francis J. Heney, for Appellants.

The court had no jurisdiction to try the question of estoppel raised by the answer of proponents, based upon the conveyance of an expectant interest in his mother's estate, and agreement not to contest her will. (*Estate of Ryder*, 141 Cal. 368, 74 Pac. 993; *Woerner on Administration*, pp. 323-5; *Smith v. Westersfield*, 88 Cal. 374, 26 Pac. 206; *Neary v. Godfrey*, 102 Cal. 338, 37 Pac. 655; *Haynes v. Meeks*, 10 Cal. 110, 70 Am. Dec. 703; *Code Civ. Proc.*, secs. 1665-1668.) The contract and conveyance were legally void. (*Estate of Wickersham*, 138 Cal. 355, 70 Pac. 1076, 71 Pac. 437.) The burden of proof was upon the proponents to show fairness of the contract and the adequacy of consideration. (*Clarke v. Fast*, 128 Cal. 422, 61 Pac. 722; *Pomeroy's Equity Jurisprudence*, sec. 953.)

Lippitt & Lippitt, Campbell, Metson & Campbell, Thomas J. Geary, and Thomas H. Breeze, for Respondents.

The court had jurisdiction to determine the question of waiver and estoppel of the contestants to claim any interest

in the estate of the mother or to contest her will. (*Estate of Edelman*, 148 Cal. 233, 113 Am. St. Rep. 231, 82 Pac. 962; *In re Garcelon*, 104 Cal. 570, 584, 43 Am. St. Rep. 134, 38 Pac. 414; *Daniels v. Benedict*, 97 Fed. 367, 378, 38 C. C. A. 592; *Estate of Summerville*, 129 Pa. 631, 18 Atl. 554; *In re Davis*, 106 Cal. 453, 39 Pac. 756; *Trull v. Eastman*, 3 Met. 121, 37 Am. Dec. 126; *Curtis v. Curtis*, 40 Me. 24, 63 Am. Dec. 651; *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. 956; *In re Peaslee's Will*, 73 Hun, 113, 25 N. Y. Supp. 940; *In re Hamilton*, 57 N. Y. St. Rep. 810, 27 N. Y. Supp. 813.)

SHAW, J.—This is an appeal from a judgment declaring the appellants estopped from asserting any interest in the estate of the deceased, adjudging that they are not interested in said estate, and dismissing their petitions to revoke the probate of the will of said deceased.

Lydia C. Wickersham died on February 10, 1900, leaving as next of kin four children,—namely, Frank P. Wickersham, Frederick A. Wickersham, Lizzie C. Wickersham, and May L. Bergevin. On March 27, 1900, the will of said deceased was duly admitted to probate by the superior court. Frank P. Wickersham died on March 14, 1900, leaving surviving as his sole heirs at law the appellants Cora L. Wickersham, his widow, and I. G. Wickersham, his minor son. Thereafter, petitions of the appellants to revoke said probate were filed, and the respondents filed answers thereto. The questions for decision upon this appeal arise out of the allegations of the paragraphs numbered one in the answers to the respective petitions of the appellants to revoke such probate, and upon the judgment of the court rendered upon the trial of the issues presented by said paragraphs.

The purport of the part of the answers in question is that the appellants are not persons interested in the estate of the deceased Lydia C. Wickersham, because of the fact alleged, that Frank P. Wickersham, prior to the death of his mother, executed to his mother, Lydia C. Wickersham and to his brother and sisters, the respondents herein, a contract whereby he conveyed to his said brother and sisters all his prospective right, title, interest, and estate as heir, legatee, or devisee of Lydia C. Wickersham in and to all of the property of which she might die possessed, and agreed with all of said

parties that he would not thereafter assert any right, title, or interest as heir or otherwise of the said Lydia C. Wickersham to the estate owned or possessed by her at her death, nor in any manner or to any extent question, dispute, or contest any disposition of her property made by her deed, contract, or will. The due execution of this contract was admitted. The court found that it was valid and binding upon the appellants, and thereupon it adjudged that they were not persons interested in the estate of Lydia C. Wickersham, deceased, and entered the judgment above mentioned, dismissing their petitions.

The appellants demurred to this paragraph of the answer on the ground that it did not state facts sufficient to constitute a defense or to show that the appellants are not persons interested in said estate. The principal defect urged to the sufficiency of this part of the answer is that it does not appear therefrom that the consideration paid to said Frank P. Wickersham for the contract set forth therein was adequate. Their contention is that a contract of this kind, whereby an heir conveys his prospective interest in the estate of his ancestor, or agrees not to contest or question the disposition thereof made by the will, is invalid unless it is founded upon a full and adequate consideration, and is entered into fairly and freely by the party against whom it is asserted, and that a person who seeks to enforce such a contract against an heir or his successors, or to estop such heir or successors from claiming their share of the estate, or from contesting a disposition by will, must allege and prove that the consideration was full and adequate, and that the contract was fairly obtained. It must be conceded that this is the general rule applicable to ordinary cases where the heir conveys his expectancy to a third person, or agrees with the other heirs before the death of the ancestor not to contest a testamentary disposition. (2 Pomeroy's Equity, sec. 953; 5 Am. & Eng. Ency. of Law, p. 769.) The leading case on the subject in this state is *Estate of Garcelon*, 104 Cal. 570, [43 Am. St. Rep. 134, 38 Pac. 414]. In that case the particular point of the inadequacy of the consideration was not raised, but in the discussion the necessity of an adequate consideration is fully recognized. We think, however, that upon a fair construction of the portion of the answer relating to this subject it will be found sufficient in that

respect. It is often said that a pleading is to be construed most strongly against the pleader. This is the usual expression of the rule, but the true and accurate statement thereof, and the one binding upon courts in this state, is that contained in section 452 of the Code of Civil Procedure, "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." There is no direct averment that the consideration to Frank P. Wickersham was full and adequate. Such a statement would have been useless, for it would have been a mere conclusion of the pleader. The adequacy of the consideration must appear from the facts stated. (*White v. Sage*, 149 Cal. 616, [87 Pac. 193]; *Stiles v. Cain*, 134 Cal. 171, [66 Pac. 231].)

The answer relating to this estoppel shows that the entire estate of Lydia C. Wickersham, with the exception of some fifteen thousand dollars, which was her separate property, consisted of her interest in the estate of her husband, I. G. Wickersham, who died on June 20, 1899, leaving an estate of the value of \$612,163. He left a will bequeathing to Frank P. Wickersham the sum of five dollars, and declaring that he had advanced to him about one hundred thousand dollars, which was to be in full of all his interest in his father's estate. On June 26, 1899, this will was filed for probate, and on July 10, 1899, Frank initiated a contest thereof, upon the grounds that I. G. Wickersham was incompetent, of unsound mind, and under the undue influence of his, said contestant's brother, Fred, and his sister Lizzie at the time the will was executed. His mother, brother, and sisters were much grieved and mortified at the allegations of his written opposition to the probate of the will and eager and desirous to avoid publicity and the notoriety which would result from the trial of the contest and the scandal of a family quarrel. Frank was at that time indebted to his father's estate in the sum of fifteen thousand dollars and to his mother in the sum of thirty-five hundred dollars. Thereupon negotiations were entered into between him and his mother, brother, and sisters to compromise the contest of the will of his father and to effect a final settlement and adjustment of all title of Frank to the property constituting the estate of his father and all his prospective interest in the estate of his mother, to avoid a

family quarrel and dissension, to preserve and protect the name and memory of the father, to avoid the expense of protracted litigation, to secure the speedy distribution of the estate of his father, and to guard against similar attacks by Frank or his heirs upon any disposition that might then or thereafter be made by Lydia C. Wickersham, his mother, of her estate. Frank took an active part in the negotiations, was assisted therein by the appellant, Cora L. Wickersham, and by the attorney he had employed to prosecute his contest, and at all times consulted with them. All the data, memoranda, books of account, records, facts, and things whereby he could ascertain the nature and situation of the property constituting the estate of his father and of his mother and could ascertain the value thereof, were at all times during and pending said negotiations at the disposal and subject to the inspection of Frank and his attorney, and they made careful and diligent search and inquiry concerning the same, and knew the exact nature, location, and value of each piece and parcel of property belonging to both of said estates. As a result of these negotiations the compromise and family settlement of all the matters under consideration was effected. Lydia C. Wickersham agreed to release to Frank his indebtedness to her and to the estate of his father, and to surrender and deliver the notes given by him for said debts, and to pay him twenty-eight thousand dollars in cash, upon condition that he would dismiss his opposition to the probate of his father's will, and accept said release, surrenders, and moneys in full and complete satisfaction and settlement of all right, title, and interest in his father's estate, would grant, bargain, and sell unto his mother, brother, and sisters whatever interest he had therein, and all prospective interest in the estate of his mother, and would agree not to question, dispute, or contest any testamentary or other disposition of her property made by her. In pursuance of this agreement the contract in question was executed on August 29, 1899, embodying the terms agreed on as above stated. This contract is made a part of the answer and is set forth in full therein. It declares that at the time of executing it Frank P. Wickersham was not under duress, menace, or in any wise coerced or forced into the making thereof by any cause or person whatever, and that he made the same with a full

knowledge of the value of the property conveyed. Thereupon he dismissed his opposition to the probate of the will of his father, the indebtedness owing by him was released, and his mother, brother, and sisters paid him the sum of twenty-eight thousand dollars as agreed upon. No part or portion of the money thus paid has ever been restored or offered to the respondents, or to Lydia C. Wickersham, or to her personal representatives. At the time the answer in question was filed the time for filing claims against Frank's estate had expired, and no claim for the indebtedness above mentioned had ever been filed or presented. His estate was, therefore, effectually released from the payment of the said debts.

The total amount received by Frank P. Wickersham as a consideration for this conveyance and agreement was forty-six thousand five hundred dollars, aside from the accrued interest upon his debts. Adding to the estate of the father the one hundred thousand dollars advanced to Frank, would make seven hundred and thirteen thousand dollars for division among the four children in the event that both his father and mother had died intestate. His one-fourth interest in this would be one hundred and seventy-eight thousand dollars, of which there would be due him, after deducting his advancements, seventy-eight thousand dollars. The amount he received was, therefore, some thirty-one thousand five hundred dollars less than he might have received had he been successful in contesting the wills of his father and mother respectively. In this adjustment the two estates are considered as one, the advancement added to the total and charged against Frank in the division. It is just and equitable to do this for the purpose of determining the sufficiency of the consideration. If nothing more were to be considered than these bare figures, it would be obvious that the consideration received by him was not adequate. But very much more than this was involved. His father had made a will practically disinheriting him. He was fully advised of all the facts relating to his proposed contest, and must be presumed to have been well advised by his attorney as to his prospect of success. His mother was living and had the full right to follow her husband's example, and dispose of her property without giving him any share thereof. The answer does not contain any

avements as to the mother's disposition towards him, aside from the fact that she agreed to the compromise that was made, and presumably insisted upon the terms there stated. It may be assumed, therefore, that this contribution from her estate to him was all that she desired to give him. His chance of obtaining any part of her estate was, at best, remote and contingent. He had in advance received eleven thousand dollars more than his due share as heir of his father. He was about to enter upon a protracted and expensive litigation, involving all the bitterness and feeling, passion, and strife, usually engendered by such family contests, and this settlement was intended, not only to give him a share of the estate, but to settle all these disputes, to end litigation, and prevent further dissension, bad feeling, and quarrels. It appears from the allegations that it was satisfactory to him, that he had full knowledge of all the facts, and that he acted freely and without coercion. It is claimed by the respondents that it is not necessary to show the adequacy of the consideration in cases where the contract is made with the ancestor, and in support of this position they cite the decision of *Estate of Edelman*, 148 Cal. 237, [113 Am. St. Rep. 231, 82 Pac. 962]. This seems to be the effect of the decision in that case, but it is not necessary to rest our decision upon that ground, inasmuch as we think that, under the circumstances, it must be conceded that the answer sufficiently shows a reasonably adequate and full consideration for the conveyance of his interest in his mother's estate and for his agreement not to dispute the validity of her will. The demurrer was properly overruled.

The appellants contend that the court abused its discretion in denying their application to postpone the hearing of the contest until after the determination of the proceedings then pending for the final distribution of the estate of I. G. Wickersham, deceased. This was a matter that was entirely within the discretion of the trial court. We can see nothing in the facts which shows any abuse of that discretion.

There is nothing in the contention that the court had no jurisdiction to try the issue of estoppel based upon the conveyance of the expectant interest of Frank P. Wickersham to the respondents. The code provides that when a will has been admitted to probate "any person interested may, at any

time within one year after such probate, contest the same or the validity of the will." (Code Civ. Proc., sec. 1327.) In order to be entitled to make this contest, therefore, the petitioner must show that he is interested in the estate of the deceased. This statement, that he is interested, may be denied by the respondents and an issue will thus be raised, which the court must necessarily decide, either immediately before proceeding with the contest, or simultaneously with the decision of the issues raised as to the validity of the will. It is within the discretion of the court to control the order of proof and require the contestant first to establish his interest. (*Estate of Edelman*, 148 Cal. 236, [113 Am. St. Rep. 231, 82 Pac. 962].) The court had jurisdiction of the contest of the will, and it must therefore have jurisdiction to determine all preliminary matters relating thereto and concerning the right and interest of the contestant. The opinion in *Estate of Ryder*, 141 Cal. 368, [74 Pac. 993], is not contrary to this proposition. That case related to the power of the court in proceedings upon distribution of an estate, to determine an issue attempted to be made between the grantee of an heir-apparent and an heir as to the validity of the deed under which the grantee claimed. It was there held that the jurisdiction of the superior court in probate was entirely statutory, and that the statute relating to distribution did not give the court power to entertain or decide such questions in connection with the making of distribution; that the statutory method was to distribute the estate to the heir-apparent, and leave him and his grantee to settle the question of the validity of the conveyance of his interest in any appropriate manner, by a distinct suit in a court of competent jurisdiction.

The proposition that a conveyance of a prospective interest in the estate of an ancestor, and an agreement not to contest any disposition thereof made by the will of such ancestor, is not against public policy, but is valid and binding, if founded on an adequate consideration, was fully settled by this court by the decision in *Estate of Garcelon*, 104 Cal. 570, [43 Am. St. Rep. 134, 38 Pac. 414].

After the court had begun the trial of the preliminary issue as to the interest of the contestants and the evidence of the proponents on that question was closed, the contestants demanded a trial by jury of the issues arising upon the peti-

tion of the contestants and the answer thereto. The court denied the application, and this ruling is assigned as error. If the contestants intended thereby to obtain a trial by jury of the issues with respect to their interest in the estate, the request was properly denied, because it came after the trial had begun. If their purpose was to secure a trial by jury of the issues arising with respect to the validity of the will of the deceased, there could be no error in refusing it, inasmuch as the court rightfully, as we have concluded, held that they had no interest, and that there would be no trial of the contest attempted to be initiated by them.

The proponents, upon the trial of their answer in estoppel, introduced in evidence the contract set up therein, and thereupon rested their case upon that issue. The contestants then moved for judgment in their favor upon the plea of estoppel, upon the ground that it had not been shown that the consideration paid by the contract was adequate, or that it was fair, just, and equitable as to Frank P. Wickersham, or fairly obtained from him. The motion was denied, and this ruling was also assigned as error. We think there was no error in this ruling. The contract recited very fully the negotiations leading up to its execution and the consideration, purposes, and intention of the agreement, and was *prima facie* evidence of all the facts necessary to give it validity and effect.

It is earnestly contended by the contestants that the evidence is insufficient to justify the finding of the court that the contract was fairly obtained, or that it was just and reasonable and founded upon an adequate consideration. There was, in our opinion, sufficient evidence to support the findings in these particulars. There is no express finding that there was an adequate consideration for the contract. The facts alleged in the answer bearing upon that subject are repeated in the findings, however, and this, as before stated, makes a sufficient showing on that point. It is claimed that the evidence shows, without conflict, that the contract was obtained by means of false representations made to Frank to the effect that his mother had at that time executed a will and that his father's estate was separate property. The evidence is conflicting as to the making of the representations referred to, and this is sufficient to prevent a revision of the

finding of the court on the subject. Furthermore, there is evidence tending to show that Frank did not make the agreement on the theory that his father's property was separate estate, but that, for the purpose of adjusting the amount to be paid him, all the parties assumed that it was community property. There is also sufficient evidence to show that at the time of the negotiations leading up to the contract his mother had in fact made a holographic will disinheriting him.

It is contended that the statements of this court in the opinion in the case of *Estate of Wickersham*, 138 Cal. 355, [70 Pac. 1076, 71 Pac. 437], constitute some sort of an adjudication that Frank, in his lifetime and after his mother's death, still held the legal title to his interest as heir in her estate, notwithstanding his previous conveyance thereof to his brother and sisters. The point is not very important, inasmuch as it is the equitable right thereto and not the legal title which is here in controversy. But it is impossible that the opinion in that case could have the effect claimed. That case was an appeal from a decree of distribution of the estate of I. G. Wickersham, and the only right involved, so far as Frank was concerned, was his right to that estate. His right of inheritance from his mother was not involved and could not be adjudicated. Nor could any remarks in the opinion in that case constitute the law of this case, so as to be binding on this court regardless of its legal soundness. Not being a former appeal in the same case the doctrine of the law of the case does not apply.

The judgment appealed from is affirmed.

Sloss, J., Angellotti, J., Lorigan, J., and Henshaw, J., concurred.

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[S. F. No. 4842. In Bank.—May 20, 1908.]

WILLIAM EDE COMPANY, Appellant, v. WILLIAM B. HEYWOOD et al., Respondents.

TAX ON MORTGAGE INTEREST—PAYMENT OF TAX BY GRANTOR OF MORTGAGOR—LIABILITY OF MORTGAGEE.—A purchaser of real property, which was subject to a lien for unpaid taxes assessed on the interest of a mortgagee thereof under a mortgage executed by his grantor, who subsequently pays the tax for the purpose of releasing the land from the lien, cannot recover the amount so paid from such mortgagee, as there was no contractual relation existing between them. Even if the rule were otherwise, it could not operate to impose a liability on the original mortgagee who had assigned the mortgage upon which the tax was assessed prior to the date on which the tax became a lien.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

J. C. Bates, for Appellant.

Powell & Dow, for Respondents.

ANGELLOTTI, J.—Plaintiff appeals upon the judgment-roll alone from the judgment in favor of the defendants.

The action is to recover money alleged to have been paid by the plaintiff to the use of the defendants. The facts are as follows: On the first Monday of March, 1905, the defendant William B. Heywood was the owner and holder of a duly recorded mortgage on certain land in San Francisco, and on that date the taxes for that year on his interest as such mortgagee became a lien on the said interest (Pol. Code, sec. 3718). This interest for purposes of taxation is an interest in the land (Const., art. XIII, sec. 4; Pol. Code, sec. 3627). On April 19, 1905, this mortgage was fully paid and satisfaction thereof entered of record. On June 1, 1905, the land was conveyed by Louis Friedlander and Jennie Friedlander, his wife, and F. K. Houston and Mary F. Houston, his wife, the owners thereof, by their grant, bargain, and sale deed, to plaintiff. The aforesaid taxes on the mortgage interest were

duly assessed and levied. On November 1, 1905, plaintiff gave notice to said defendant that said taxes remained unpaid, and demanded that said defendant pay the same, which he then and ever since has refused to do. On November 27, 1905, being the last day for payment before delinquency, plaintiff paid the taxes. Said defendant, although requested so to do, has ever since refused to pay to plaintiff the amount so paid.

Upon these facts, the trial court concluded that plaintiff was not entitled to recover, and gave judgment for defendants.

The case before us is simply that of one who has purchased real property with the title burdened by an encumbrance done, made, or suffered by the grantor, or some one claiming under him, seeking to recover the sum that he has paid to discharge such encumbrance, not from his grantor or his heirs, but from a third person with whom he has not and never had any contractual relation whatever. This was exactly the case of *McPike v. Heaton*, 131 Cal. 109, [82 Am. St. Rep. 335, 63 Pac. 179], where the plaintiffs had purchased land subject to a tax-lien, which should have been paid by the defendant to whom the property was assessed, but who was not plaintiffs' immediate grantor and bore no contractual relation to them. It was held that the covenant against encumbrances done, made, or suffered by the grantor or any person claiming under him, implied from the use of the word "grant" in the conveyance made by plaintiffs' grantor (Civ. Code, sec. 1113), which included taxes (Civ. Code, sec. 1114), did not run with the land, or pass to the assignee, *and that as plaintiffs had no contractual relation with defendant, no recovery against him could be had.* That without some contractual relation, there could be no obligation on the defendant so far as the plaintiffs were concerned. It was said: "They could have protected themselves against these taxes either by assuming their payment as a part of the consideration for the purchase, or by suitable covenants with Jackson" (their grantor), "but they have no right of action therefor against the defendants." In *Canadian etc. Co. v. Boas*, 136 Cal. 419, [69 Pac. 18], it was held that a mortgagee who had obtained title to the property by foreclosure proceedings, could not recover of a junior mortgagee whose interest in the property had been extinguished by the fore-

closure proceedings, the amount paid by it in redeeming the property from a sale to the state for taxes assessed against such junior mortgagee on such junior mortgage. This decision was based on the proposition that there was no contractual relation whatever between the plaintiff and defendant with respect to the moneys sued for, and it was said that the plaintiff was in no different position from that of any other purchaser of land who finds his title clouded. The case of *Henry v. Garden City Bank etc.*, 145 Cal. 54, [78 Pac. 228], was substantially the same in facts and in result. (See, also, *Bock v. Gallagher*, 114 Mass. 28.) All of these cases proceed upon the theory that one who buys property from another takes it just as it is, regardless of the nature of the title, or the number or character of liens resting upon it, except in so far as he is protected by contract. Independent of contract, neither his immediate grantor nor any other person is under any obligation to make perfect the title for him, or discharge any encumbrance or lien on the property. By reason of section 1113 of the Civil Code, certain covenants on the part of the grantor for himself and his heirs are implied from the use of the word "grant" in any conveyance by which an estate of inheritance or fee simple is to be passed, unless otherwise expressly provided in the conveyance, and the right of the grantee to reimbursement from the grantor and his heirs for money necessarily paid by him to discharge encumbrances so covenanted against, thus rests on the terms of his contract. It is impossible to distinguish these cases from the case at bar, and under the doctrine declared thereby, the conclusion of the learned judge of the trial court was correct. Appellant relies strongly upon the case of *San Gabriel Co. v. Witmer Company*, 96 Cal. 623, [29 Pac. 500, 31 Pac. 588]. There can be no doubt that its contention finds support in the conclusion reached in that case, but that case, decided by a bare majority of this court, and the case of *Angus v. Plum*, 121 Cal. 608, [54 Pac. 97], decided upon the authority of the former case, have been practically overruled by the later decisions already cited, so far as the same might be held applicable under the circumstances appearing in this case.

As to the defendant William H. Heywood, the judgment would be right, even if the contention of appellant as to the

law applicable were to be upheld. He was the original mortgagee, and the record shows that on April 24, 1904, he duly assigned and transferred the mortgage upon which the tax was assessed to the defendant William B. Heywood. As he was not the owner of the mortgage interest on the first Monday of March, 1905, he, of course, was never liable for the tax.

The judgment is affirmed.

Lorigan, J., Henshaw, J., and McFarland, J., concurred.

SHAW, J., dissenting.—I dissent. The complaint in the case does not allege that the mortgage on which the tax was levied had been paid. The answer alleges that it was fully paid and satisfied on April 19, 1905, and the court so found. It is not claimed that the amount of the mortgage tax was deducted or retained by the mortgagor at the time this payment was made or at all. The case, therefore, presents the question of the rights of one who has purchased property burdened with a lien for the payment of an obligation of a third person with whom he has no direct contractual relations, and who has been compelled to pay money to discharge that lien, to recover of the person whose obligation he has thus been compelled to pay, the money paid in discharge thereof. In my opinion the facts make a clear case, under the common law, in *assumpsit* for money paid. The subject is exhaustively treated and the cases at common law discussed by Professor Keener in his work on Quasi Contracts (pp. 388, 400). He prefaces the discussion by this general statement of the rule: "No one officiously paying the debt of another can maintain an action either at law or in equity to recover the money so paid. . . . If, however, the payment made, though made without request, is not regarded in law as having been officiously made, the party so paying is entitled to be reimbursed by the debtor to the extent that the debt as between the debtor and himself should in equity and good conscience have been paid by the debtor." Other authorities are of similar effect: "An action for money paid is maintainable in every case in which there has been a payment of money by plaintiff to a third party, at the request of the defendant, express or im-

plied, with an undertaking, express or implied, to repay the amount. . . . And whether the request be direct, as where the party is expressly desired by the plaintiff to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference." (27 Cyc. 833.) And further: "Where, in order to protect his own property, real or personal, the owner pays off an outstanding encumbrance which another has undertaken or is legally liable to pay, he may recover from such other the amount so paid by him in an action for money paid." (27 Cyc. 834.) "It is well settled that where one person is compelled to pay money which another is under legal obligation to pay, the former is entitled to recover it back from the person legally bound. The necessary request will be implied as well as the promise, where the consideration consists in the plaintiff's having been compelled to do that, to perform which the defendant is legally compellable. Under these circumstances the person paying the money has the same right of action as if he had paid it at the other's express request." (15 Am. & Eng. Ency. of Law, 1108; 27 Cyc. 835, 837.) As to the application of this rule, the instance of one who is compelled to pay money to prevent seizure or sale of his property for the debt of another is given. (15 Am. & Eng. Ency. of Law, 1110.) The duty to pay taxes is not, for some purposes, regarded technically as a debt. Nevertheless the rule applies where the obligation to pay consists of taxes assessed against the defendant as well as in cases of ordinary debts. (27 Cyc. 835, citing many cases; *Hogg v. Longstreth*, 97 Pa. St. 255; *Graham v. Dunnigan*, 6 Duer, (N. Y.) 629.) The decisions of the courts fully establish these propositions. Those of the courts of this country are very numerous. They are noted in detail in 35 Century Digest at columns 44 to 53 inclusive. A number of the English cases are referred to by Professor Keener in the chapter above cited. The rule has been followed in this state and the right to recover money paid for taxes on a mortgage interest, under facts similar to those here involved, sustained in *San Gabriel etc Co. v. Witmer Bros. Co.*, 96 Cal. 623, [29 Pac. 500, 31 Pac. 588], and *Angus v. Plum*, 121 Cal. 608, [54 Pac. 97].

For the sake of clearness it should be said that in cases of this character the request and promise said to be implied

in law are mere fictions invented by the common law courts because, under the common law system of procedure, no remedy was provided except an action of *assumpsit*, in which, according to the rule of pleading, the declaration was required to allege both a request and a promise, and it was therefore necessary to the ends of justice to presume a request and promise where none were made, in order to sustain the action and give the party a remedy to enforce a manifest right. In this state where forms of action are abolished and a statement of the facts constituting the cause of action is all that is required of the plaintiff (Code Civ. Proc., sec. 426), it is unnecessary to allege either the request or the promise, if the facts show a liability of defendant to plaintiff. The liability really rests, not on the implied request and promise, but on the principles of justice and right which require the defendant to repay to plaintiff what plaintiff has been obliged to pay for his benefit. (Keener on Quasi Contracts 14; *San Luis Obispo Co. v. Gage*, 139 Cal. 407, [73 Pac. 174].)

In equity also, the recovery may be had upon the principle that the plaintiff is subrogated to the rights of the party to whom the money was paid. "Any person having an interest in property on which there is a lien or encumbrance may, if necessary for his own protection, pay off the same and be substituted to the rights and remedies of a holder thereof." (27 Am. & Eng. Ency. of Law, p. 235.) The tax here involved was, when paid, a lien on the plaintiff's land. It was assessed upon an interest therein while that interest belonged to the defendant. It was therefore a personal obligation of the defendant, having "the effect of a judgment against the person." (Pol. Code, sec. 3716.) The statute of 1880 authorizes a county to sue in its own name to recover delinquent taxes. (Stats. 1880, p. 186; *Los Angeles v. Ballerino*, 99 Cal. 595, [32 Pac. 581, 34 Pac. 329].) If not technically a debt due the state, it was at least a personal obligation of the defendant, upon which a civil suit could be maintained and a personal judgment recovered by the county. (See, also, *Perry v. Washburn*, 20 Cal. 351; *People v. Seymour*, 16 Cal. 343, [76 Am. Dec. 521]; *McCore v. Patch*, 12 Cal. 270; *Oakland v. Whipple*, 39 Cal. 115; *Couts v. Cornell*, 147 Cal. 563, [109 Am. St. Rep. 168, 82 Pac. 194].) The plaintiff was compelled to pay

the tax to avoid a sale of his property therefor, and in equity he is subrogated to the right of the city and county of San Francisco and may maintain an action to recover the money paid. By the principles of the common law aforesaid the effect is the same. The said defendant owned the property, that is, the mortgage interest, at the time the lien for the taxes accrued. It was his duty, both in law and in morals, to pay the same. The plaintiff did not pay them officiously or voluntarily, but to protect his own property and only after the defendant had expressly refused to pay. By the principles stated he was entitled to be reimbursed by the defendant.

It is contended that the decisions of this court in *McPike v. Heaton*, 131 Cal. 110, [82 Am. St. Rep. 335, 63 Pac. 179]; *Canadian etc. Co. v. Boas*, 136 Cal. 420, [69 Pac. 18], and *Henry v. Garden City Bank*, 145 Cal. 54, [78 Pac. 228], have overruled *San Gabriel Co. v. Witmer*, 96 Cal. 623, [29 Pac. 500, 31 Pac. 588], and *Angus v. Plum*, 121 Cal. 608, [54 Pac. 97], and have established a rule contrary to the principles above stated.

McPike v. Heaton was not a case of mortgage taxes. Heaton the owner of the land on the first Monday of March, conveyed by grant deed to one Jackson, on March 27th, and on the next day Jackson conveyed to McPike, the plaintiff. The case was treated as an action upon the covenant implied from the grant, and it was held that the covenant of Heaton against the tax-lien accruing during his ownership did not run with the land, nor pass to McPike with the grant by Jackson to him. The *Witmer* case was distinguished, although incorrectly, but not overruled. The further statement in the opinion, that the defendant was under no personal liability for the tax and that payment could be enforced only by a sale of the land, was manifestly incorrect in view of the statute of 1880 aforesaid and the decisions in *Los Angeles v. Ballesterino*, 99 Cal. 595, [32 Pac. 581, 34 Pac. 329], and the other cases above mentioned. It may be that the case involved the principles applied here and might have been decided differently if those principles had been recognized and enforced, but they were not in any way referred to and I cannot presume that the court intended silently to overrule and set aside doctrines so well established. This is particularly

true of a common law rule which by statutory enactment is made the rule of decision in all the courts of this state. (Pol. Code, sec. 4468.)

I cannot agree with the main opinion in holding that the case at bar is identical with *McPike v. Heaton*, 131 Cal. 110, [82 Am. St. Rep. 335, 63 Pac. 179], as that action was considered in the opinion therein rendered. The conclusion there reached was manifestly based in large part upon the assertion which, as I have shown, was erroneously made, that the defendant was under no personal liability for the tax and payment could be enforced only upon a sale of the land. If that were the case here, if there were no obligation on the part of the mortgagee to pay the tax assessed against the mortgage interest, either as between himself and the state, or as between himself and the plaintiff, then no principle of equity and good conscience would give the plaintiff the right to ask of him the repayment thereof. But when it is seen that the mortgagee was under both a moral and legal obligation to pay the tax and that such obligation was enforceable against him by suit, it should be perceived at once that the highest considerations of equity and good conscience demand that another should not be compelled to pay it gratuitously for his benefit without having a right of action against him.

In *Canadian etc. Co. v. Boas*, 136 Cal. 420, [69 Pac. 18], the defendant was a junior mortgagee, and the plaintiff a purchaser at a foreclosure sale, under a prior mortgage. The interest of Boas as mortgagee, on which the tax was assessed prior to the foreclosure, had been extinguished by the foreclosure and sale. In *Henry v. Garden City Bank*, 145 Cal. 54, [78 Pac. 228], the facts were substantially the same. There may be a serious question in such cases, especially if the mortgagor is insolvent, whether, under the principles of law and equity above mentioned, when the mortgagee's beneficial interest has been completely destroyed and the entire estate thus transferred to a purchaser, such mortgagee is "in equity and good conscience," as between him and the purchaser, bound to pay the taxes accrued on an interest which has become a mere shadow, its substance having passed to the purchaser. In actions for money paid by plaintiff to defendant's use, the existence of this element in plaintiff's grounds of recovery in each case, or class of cases, must depend upon

the facts of the particular case. It may be conceded that, in this state, these cases establish the rule that equity and good conscience do not demand that a junior mortgagee shall pay the tax on his former mortgage interest, for the benefit of a purchaser at a foreclosure sale which has demonstrated that that interest had no real value.

The present case is of a different character. There has been no foreclosure, the suit is practically by a mortgagor against a mortgagee for taxes paid on the mortgagee's interest, which interest has been made good by payment. The mortgagee was justly chargeable with the tax thereon. By his neglect it has devolved upon plaintiff's property, thereby forcing the plaintiff to pay the tax to relieve the property from the lien. The payment unquestionably was of benefit to the defendant. Therefore, even if those decisions are sound, the principles on which they rest should not be applied to this case.

It is true that there is a long line of cases holding that where one who buys property by quitclaim deed and subsequently finds that property encumbered by liens of which he has taken no account in making his purchase, and which he is compelled to pay to protect his property, he has no right of action to recover the money thus paid from his grantor, and that no covenant not running with the land will protect him as against previous owners, or give him a right of action against them. But it is also true, and has been settled for many years by the authorities above cited, that where such person is thus compelled to pay the debt of another which, as between himself and that other, the other in equity and good conscience should have paid, he may recover the amount paid without resort to any covenant and in the absence of any contractual relations between them. The right of action in such cases does not spring from the existence of contractual relations, but from principles of justice and equity which do not require one person to pay the debt of another, under compulsion, and not officiously, which that other was in duty bound to pay himself.

Sloss, J., and Beatty, C. J., concurred.

Rehearing denied.

[S. F. No. 4640. In Bank.—May 20, 1908.]

MERCED OIL MINING COMPANY et al., Respondents,
v. R. L. PATTERSON et al., Appellants.

CONSOLIDATED PLACER MINERAL LOCATION—CONVEYANCE OF SPECIFIC PORTION OF CLAIM—DISCOVERY OF OIL BY GRANTEE—EFFECT OF DISCOVERY ON BALANCE OF CLAIM.—Where eight persons, as associates, enter upon and locate a tract of one hundred and sixty acres of vacant, unoccupied mineral lands of the United States under the placer mining laws, mark the boundaries of the consolidated claim, and proceed with the work of development to make an oil discovery, but before any discovery of oil had been made by them they all join in conveying a specific portion of the consolidated claim to a third person, who prosecutes the work of discovery on the portion so conveyed, and subsequently makes a sufficient discovery of oil thereon, the effect of such conveyance, in the absence of any contrary understanding or agreement between the parties, is to surrender to the grantee all of the rights which the grantors formerly enjoyed in the portion conveyed, and to constitute it a separate and independent claim; and the subsequent discovery of oil thereon by such grantee would not inure to the benefit of such associates or their grantee of other portions of the consolidated claim, so as to perfect the location of the remaining portions of the consolidated claim.

ID.—AGREEMENT MAKING WORK BY GRANTEE OPERATE FOR BENEFIT OF ENTIRE CLAIM—CONSIDERATION—PAROL EVIDENCE.—If as a part of the consideration of the deed by the associates to the specific portion of the consolidated claim it was understood and agreed between the parties that the labor done and money expended by the grantee on the portion conveyed should operate for the benefit of the land remaining in the possession of the associates, such effect will be given it, and the value of the work and the resulting discovery would then inure to the benefit of the land remaining in the possession of the associates, and of all their subsequent grantees. That such an agreement was part of the consideration of the deed may be shown by parol.

APPEAL from a judgment of the Superior Court of Fresno County and from an order refusing a new trial. George E. Church, Judge.

The facts are stated in the opinion of the court.

N. C. Caldwell, and E. A. Williams, for Appellants.

Frank H. Short, and F. E. Cook, for Respondents.

HENSHAW, J.—In May, 1899, C. C. Spinks and his seven associates entered upon and located under the Placer Mining Laws one hundred and sixty acres of vacant, unoccupied mineral lands of the United States. The mineral for which the lands were thought to be valuable was oil. The boundaries of the consolidated claim were marked and the locators proceeded with the work of development to make an oil discovery. On the twenty-seventh day of January, 1900, and before any discovery of oil had been made by the associates, they conveyed a certain forty acres of their one hundred and sixty acres to the Merced Oil Mining Company, and on the twentieth day of February, 1900, they conveyed another forty acres to C. H. Castle. The Merced Oil Mining Company prosecuted the work of discovery by drilling a well, and in the September or October following made a sufficient discovery of oil. The conveyance by Spinks and his associates of the forty acres to the Merced Oil Mining Company, so far as appears from this record, was a conveyance of their rights to the specific forty acres in severalty, and the same may be said of the forty acres conveyed to Castle.

These two plaintiffs join in a single action as deriving title from a common source, alleging a trespass and interference by the defendants with their ownership and right of possession to these lands so conveyed to them, seeking a decree quieting their title against the defendants, and an injunction restraining the defendants from further trespass and interference with the freehold. The defendants, for their claim of title, set forth later locations made by them upon these same lands. The cause was tried before a jury, which returned special verdicts upon the issues propounded. These special verdicts were adopted and embodied in the judgment of the court. A motion for new trial was made and denied, and defendants appeal from the judgment and from the order so denying their motion for a new trial.

Upon the trial the court accepted as the correct interpretation of the law the theory of plaintiffs,—namely, that the consolidated claim of Spinks and his associates to the one hundred and sixty acres constituted a single claim, with the right of possession in Spinks, his associates, and their grantees as

against attempted relocations, made while they were actually in the possession of the land and diligently prosecuting the work for the discovery of oil; that the expenditure of one hundred dollars per year upon any part of the one hundred and sixty acres was an expenditure for and on behalf of the whole claim of one hundred and sixty acres, and that a discovery of oil upon any part of the one hundred and sixty acres perfected the location of the whole one-hundred-and-sixty-acre claim. Upon this appeal respondents contend that full support for this theory of the law is found in the case of *Miller v. Chrisman*, 140 Cal. 440, [98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444]. In *Miller v. Chrisman* this court was called upon to consider a situation where the associates had conveyed all their interests in the one-hundred-and-sixty-acre claim to one of the number. The contention advanced in that case was that by these conveyances made before discovery of mineral the whole location lapsed and became void, or, in the alternative, at least, the associates' rights to one hundred and forty acres lapsed, leaving Miller, the last associate and the grantee of the others, a location of only twenty acres in and about the *situs* of the oil discovery which he afterward had made. It was said in *Miller v. Chrisman* that when the eight citizens, who separately would have been entitled to locate each no more than twenty acres, consolidated and together located one hundred and sixty acres, the location was not to be deemed eight separate locations of twenty acres each, but was, within the contemplation of the law, a single location of one hundred and sixty acres, the exterior boundaries of this location being all that they were called upon to demarcate, their right of possession being a common right of possession, their interests common and undivided interests; and that as the law governing such locations provided that when one or another of the associates abandoned, his interest should go to such associates as continued in possession doing the work, no reason could be seen why one or more of these associates could not, by conveying to their co-locators, accomplish the same result that would be worked by their abandonment, and it was therefore held that by force of such conveyance the remaining associates or associate acquired all the rights of the others in the whole one-hundred-and-sixty-acre claim. Strictly, therefore, the decision in *Miller v.*

Chrisman went no further than to hold that conveyances by the associates amongst themselves, which in no manner segregated the interests, nor destroyed nor impaired the right of possession which they enjoyed in common, were permissible and legal. The decision of the trial court in the case at bar, it is to be noted, is a long stride in advance of the decision in *Miller v. Chrisman*. By stipulation of the parties, all questions of weight and conflict in the evidence are eliminated, and the court is asked to decide the following legal questions:—

“(A) Was the discovery of oil made by plaintiff, the Merced Oil Mining Company, on the forty acres conveyed to, and held by, said company, sufficient to validate and perfect the entire location of said quarter-section under which said corporation derails title to its respective forty acres as a placer mining claim, and to relieve the said C. H. Castle from the necessity of making any discovery of oil upon the forty acres claimed by him in order to perfect his claim to such forty acres under the laws of the United States?

“(B) After the different parts and portions of said quarter-section had been conveyed to, and held by, the several parties as shown by said statement and the verdict and findings herein, was one hundred dollars' worth of work done upon any one of the several parts and portions a sufficient compliance with the laws of the United States requiring the performance annually of one hundred dollars' worth of work upon any placer mining location, as to the entire location of one hundred and sixty acres, or was each of said parties required under the laws of the United States to perform one hundred dollars' worth of work upon each part and portion so held by each party in severalty?”

The case thus presented is not that of a conveyance by one associate to another or to an outsider of his undivided interest, but is a conveyance to an outsider by all of the associates of all their interest to certain designated and described portions of their one-hundred-and-sixty-acre claim. By the conveyance to Merced Oil Mining Company (and the same is true of course of the conveyance to Castle), the associates stripped themselves of all rights of possession, of all right to enter upon the forty acres of land to prosecute their mining operations, and, upon the other hand, the Merced Oil Mining Company, in taking the associates' title to this forty acres,

acquired no right of entry whatsoever upon the lands remaining to the associates. So far as the record before us discloses, this was the situation.

No doubt may be entertained that a conveyance such as this may be made, and that the effect of such conveyance, if such be its expressed intent, is to surrender to the grantee all of the rights which the grantors formerly enjoyed. If such a surrender be made, without further understanding and agreement between the parties, it is apparent, we think, that the portion so severed must be regarded as a separate and independent claim. Excepting as preserved by the agreement of the parties, there are no rights in common between the grantors and the grantee. The right of possession to the portion of the consolidated claim so severed by conveyance is lost to the original associates. In effect it is an abandonment by them of that piece of land. It is their declaration that they no longer hold such land under the right of possession in common which they enjoy as to the remainder. It cannot be perceived, therefore, that under the circumstances stated, a discovery made by such independent owners upon the limited tract conveyed to them can be held to redound to the benefit of the associates who have parted with all interest in and control over it. This, we say, must be the condition where the agreement of the parties goes no further than to a bare conveyance of the grantor's possessory rights. But, upon the other hand, by convention and agreement of the parties, a radically different result may be legally accomplished. No one would question but that the associates might authorize a stranger to their interests to enter upon their land and sink a well, agreeing, in the event of a discovery of oil, to convey to such person any designated portion of the claim. In such case, clearly the work would be done for the benefit of all the associates and of the whole claim. It cannot make any difference that the conveyance to the party who is so to develop the land is made before or after discovery, provided that it be understood between them that, as part of the consideration, the work done and the discovery when made shall be for the benefit of the whole claim. As parol evidence is always received to show the true consideration of a contract, this part of the consideration may rest upon an oral agreement of the parties, and need not, therefore, be embodied in the

deed. As in the case of quartz locations it is permissible for two locators to join in sinking a shaft or driving a tunnel without the boundaries of their locations in their effort to strike the vein or lode, with the result that the work so done is deemed in law to have been done on and for the benefit of their respective locations, so in these placer locations no reason is perceived why the parties may not make a conveyance of a divided as well as an undivided interest, to the end that the grantee may prosecute the work of discovery for the benefit of all. But, upon the other hand, while the distinction made may perhaps be regarded as refined, nevertheless, logically, the contrary of the proposition is equally true, that if such conveyance be made without any such understanding it is in law no more than a surrender and abandonment of the possessory rights which the original locators had, and the establishment, in effect, of a new and independent location in their grantees.

Coming to apply this principle to the facts in the case, if as a part of the consideration of the deed to the Merced Oil Mining Company it was understood and agreed between the parties that the labor done and money expended upon the Merced Company's forty acres should operate for the benefit of the land remaining in the possession of the associates, such effect would be legally given. And, in turn, the value of the work and the resulting discovery would redound to the benefit of all subsequent grantees of the associates. In this sense must be understood the declaration in *Weed v. Snook*, 144 Cal. 439, [77 Pac. 1023].

The title of the Merced Oil Mining Company does not by appellants seem to be seriously questioned, but as to the right and title of Castle it appears from the instructions given by the court to the jury that they were advised, in effect, that the possession and discovery by either plaintiff on his segregated portion of the claim, was a possession and discovery of both plaintiffs. This, as has been discussed, was too broad a statement of the law, and it follows, therefore, that the judgment in favor of Castle must be reversed and the cause remanded.

The judgment in favor of the Merced Oil Mining Company is affirmed and the judgment in favor of C. H. Castle is reversed and the cause remanded.

Angellotti, J., Lorigan, J., Sloss, J., and Beatty, C. J., concurred.

[S. F. No. 4429. Department One.—May 26, 1908.]

MELISSA J. STEVENSON, Trustee, etc., Appellant, v.
THOMAS M. BOYD, Defendant, and JOSEPHINE
PORTER BOYD, his Wife, Defendant and Respondent.

TENANTS IN COMMON—PURCHASE OF ENCUMBRANCE AND ADVERSE TITLE—ENFORCEMENT OF TRUST WITHIN REASONABLE TIME.—One tenant in common of land, who purchases an outstanding encumbrance or an adverse title, will be chargeable as trustee for his companions in interest, if they choose within a reasonable time to claim the benefit thereof, by contributing or offering to contribute their proportion of the purchase money.

ID.—LAPSE OF REASONABLE TIME—LACHES IN EQUITY.—Regardless of the question of the statute of limitations, if the right to enforce the trust as against a cotenant is not asserted within a reasonable time, and the plaintiff is chargeable with laches in equity, a court of equity will refuse to entertain the suit.

ID.—PRINCIPAL FACTORS OF LACHES—DISCRETION OF COURT OF EQUITY.—The principal factors in determining whether the plaintiff has been guilty of laches, are acquiescence and lapse of time; but other circumstances are also material, such as a change in the value or character of the property. The matter is one which is left to the sound discretion of the court of equity, in each case.

ID.—LACHES OF COTENANT—PRESUMED REPUDIATION AND ABANDONMENT.—Unless a cotenant claiming the benefit of a purchase, makes his election to participate within a reasonable time, and contributes or offers to contribute his ratio of the consideration actually paid, he will be deemed to have repudiated the transaction and abandoned its benefits.

ID.—LACHES OF APPELLANT AGAINST RESPONDENT—DEED OF TRUST BY COTENANTS—SPECIAL TRUST BY ONE—TITLE UNDER SALE.—Where defendant's husband and appellant's grantor, as tenants in common of a tract of land, executed a deed of trust to secure a large loan from a bank, and appellant's grantor subsequently executed a special trust to appellant for his use for life, and for other uses specified, and the respondent wife, paid one half of the debt secured by the deed of trust and, upon a sale under the deed of trust, the title obtained was transferred in equal shares to defendant husband and respondent wife, who subsequently purchased her husband's interest at a large price, the property having greatly increased in value, and

after the lapse of two days less than four years, from the date of the sale under the deed of trust, and over nineteen months after respondent's acquisition of her husband's title, she having since made improvements on the land and cultivated it in crops, the appellant as trustee for the beneficiaries under the deed of the other cotenant, sought to charge respondent as trustee of the title, *held*, that the suit of appellant as against the respondent, was properly decided by the court below to be barred by laches.

APPEAL from a judgment of the Superior Court of Fresno County. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

Frohman & Jacobs, for Appellant.

M. K. Harris, for Respondent.

Frank H. Short, and F. E. Cook, for T. M. Boyd, Defendant.

SLOSS, J.—Thomas Boyd, now deceased, was the father of Melissa J. Stevenson, the plaintiff, Thomas M. Boyd, one of the defendants, George Culberson Boyd, and Mary Alice Zinns. In December, 1892, Thomas Boyd and his son, the defendant Thomas M. Boyd, each then owning an undivided one half of an eighty-acre tract of land situated in Fresno County, executed a deed of trust of said real property to E. R. Hamilton and W. P. Coleman, as security for the payment of their promissory note for three thousand two hundred dollars, payable two years after date to the Sacramento Bank. In October, 1897, Thomas Boyd, the father, conveyed his undivided one-half interest to the plaintiff, in trust to receive the rents and profits and to pay them to the use of the grantor, Thomas Boyd, during his life, and in case George Culberson Boyd should survive his father, to apply such rents and profits for his support and maintenance during his life. The deed of trust gave plaintiff power to sell, mortgage, or lease said real estate, and provided that if the property was not sold by plaintiff, in pursuance of said deed of trust, it should, upon the death of Thomas Boyd and George Culberson Boyd, be vested in the plaintiff and Mary Alice Zinns, share and share alike.

In July, 1897, Thomas M. Boyd married his co-defendant, Josephine Porter Boyd. Some months thereafter the Sacramento Bank, the holder of the note secured by the deed of trust to Hamilton & Coleman, requested payment of the note. Some attempt was made to raise the money, but it was not paid, and the bank finally directed the trustees to sell. The sale was originally advertised to take place in March, 1898, but Mrs. Stevenson, the plaintiff, secured from the bank a postponement for six months. In August, 1898, the defendant Thomas M. Boyd made arrangements with the Bank of Selma to pay off the loan of the Sacramento Bank, which at that time amounted to about three thousand four hundred dollars. Of this amount, some eighteen hundred dollars was furnished by the defendant Josephine Porter Boyd, and the balance by the Bank of Selma. The note was assigned by the Sacramento Bank to the Bank of Selma and the latter directed the trustees, Hamilton & Coleman, to make a sale. On October 15, 1898, the trustees did sell the property for three thousand five hundred dollars—a little more than the amount due on the note. The purchaser at the sale was the Bank of Selma, which immediately conveyed to T. M. Boyd and Josephine Porter Boyd, the defendant. On February 21, 1901, Thomas M. Boyd conveyed to his co-defendant, Josephine Porter Boyd, an undivided one-half interest in the ranch for seven thousand five hundred dollars, of which five hundred dollars was paid in cash and the balance in instalments, evidenced by notes. Some of these notes were paid by Mrs. Boyd to her husband.

On October 13, 1902, two days less than four years after the sale by the trustees to Thomas M. and Josephine Porter Boyd, and over nineteen months after the conveyance from Thomas M. Boyd to Josephine Porter Boyd, this action was brought by the plaintiff. The complaint alleged that, prior to the trustees' sale, the defendants, in pursuance of a conspiracy to that end, did by threats of violence and otherwise, prevent the plaintiff from raising the money necessary to pay off her one half of the indebtedness to the Sacramento Bank, and that they procured the Bank of Selma to take an assignment of the note and to direct a sale of the property by the trustees, Hamilton & Coleman, for the purpose of destroying the rights of plaintiff under the deed from Thomas Boyd. It is alleged

that the Bank of Selma, in taking the assignment of the note from the Sacramento Bank, was acting as agent for the defendants, and not in its own interests. In the complaint plaintiff offers to pay to the defendants such portion of the indebtedness paid to the Sacramento Bank and to make such allowance to the defendants for the cultivation of the property since the sale as the court may deem equitable. She asks for an accounting of the profits, and prays judgment that it be decreed that she is the owner, as trustee, of an undivided one-half interest in said real property, and that defendants be compelled to convey to her such interest free of encumbrance except for her just share of the indebtedness to the Sacramento Bank.

Thomas M. Boyd and his wife, Josephine Porter Boyd, answered separately. Each of the answers denies that the defendants had conspired or contrived to defeat the deed of trust under which plaintiff claims, or to deprive the plaintiff as trustee of her interest in the property, or that plaintiff was prevented by any act of the defendants, or either of them, from raising the money necessary to pay her share of the indebtedness. The defendant Josephine Porter Boyd set up a special defense of laches, alleging that at the time the land was sold by the trustees to the Bank of Selma, and by the Bank of Selma to the defendants, its value did not exceed five thousand dollars; that on February 21, 1901, Thomas M. Boyd sold his interest in the land to Josephine Porter Boyd for the sum of seven thousand dollars, more than three thousand dollars of which has been paid in cash and the balance in notes secured by mortgage; that since said sale by the trustees to the Bank of Selma and by the Bank of Selma to the defendants the land has greatly increased in value and is now of the value of about fifteen thousand dollars; that the defendant bought the interest of her co-defendant in good faith and paid and obligated herself to pay the full increased value thereof to said co-defendant Thomas M. Boyd; that plaintiff made no claim to any interest as trustee or otherwise in or to said property and took no steps and made no effort to subject said property to any claim until it had greatly increased in value. The defendant further alleges on information and belief that the plaintiff would not have made any such claim had the property not increased in value, and

that at the time the defendant Josephine Porter Boyd bought the said property the same was of little value and yielded very little income, and that in buying the same the defendants ran the risk of losing the money paid upon the purchase price thereof. It is further alleged that ever since the sale the defendants have cultivated the land and been in charge thereof and have improved and increased the value of said property.

The answer of Thomas M. Boyd, in addition to its denials of many of the allegations of the complaint, set up a claim as against his wife, the co-defendant Josephine Porter Boyd, his contention being that the eighteen hundred dollars belonging to Josephine Porter Boyd which went into the purchase of the property at the time of the trustees' sale was a loan to him, and that the conveyance of the undivided one-half interest to said Josephine Porter Boyd was made as security for such loan.

The trial resulted in findings and judgment in favor of the defendant Josephine Porter Boyd. The court found against the allegations of the complaint regarding a conspiracy between the defendants, found against the allegation that the sum of eighteen hundred dollars paid by Josephine Porter Boyd was a loan to her co-defendant, and found that the conveyance of October 19, 1898, from the Bank of Selma to Thomas M. Boyd and Josephine Porter Boyd conveyed to each of said defendants an equal undivided one-half interest in and to said property, and that the defendant Josephine Porter Boyd, in consideration of said conveyance, paid as a part of the purchase price for said land the sum of eighteen hundred dollars. It was found that Josephine Porter Boyd did not take the title of such one-half interest as security for any loan to her co-defendant Thomas M. Boyd. The allegations of the answer of Josephine Porter Boyd with reference to the defense of laches are all found to be true, except that the court finds that the value of the property at the time of the conveyance to the defendants was six thousand dollars, instead of five thousand dollars, as alleged in the answer. As conclusions of law the court found that the plaintiff should take nothing against Josephine Porter Boyd, and said Josephine Porter Boyd should have judgment against plaintiff and her co-defendant for her costs. Judgment was entered accordingly. The plaintiff appeals from the judgment.

Thomas M. Boyd has not appealed, and so far as concerns the issues raised by the pleadings between himself and his co-defendant, the finding that the payment of eighteen hundred dollars by the respondent, Josephine Porter Boyd, was not made as a loan to her husband, stands unquestioned.

The appellant's position is that, inasmuch as she and defendant Thomas M. Boyd were cotenants in the property, the latter could not purchase for himself alone the outstanding interest vested in the trustees, Hamilton & Coleman, but was bound to hold any title acquired on such purchase for the equal benefit of himself and his cotenant upon condition that the latter should contribute or offer to contribute her portion of the purchase money. This is undoubtedly the general rule as to cotenants. "A cotenant cannot take advantage of any defect in the common title by purchasing an outstanding title or encumbrance and assert it against his companions in interest. The purchase is, notwithstanding his design to the contrary, for the common benefit of all the cotenants. The legal title acquired by him is held in trust for the others if they choose within a reasonable time to claim the benefit of the purchase by contributing or offering to contribute their proportion of the purchase money." (Freeman on Cotenancy and Partition, 2d ed., sec. 154.) The respondent contends that this principle applies only where the cotenants hold under the same instrument. Whether or not the rule is subject to this qualification is a question which has given rise to a considerable conflict of authority. It need not, however, be here decided. Assuming that the plaintiff (regardless of her allegations that the defendants prevented her from paying off her share of the debt to the Sacramento Bank) was entitled, as against her cotenant and his wife, to claim the benefit of the purchase by them of the interest sold by the trustees, she must still fail, for the reason that the court below found that her cause of action was barred by laches. This finding is fully sustained by the proofs offered and the principles of law applicable.

The plaintiff's delay in seeking relief in the courts had not lasted for such a period as to make the statute of limitations available as a bar to the suit. Undoubtedly mere delay to commence the suit for a period less than that of the statute of limitations is not a sufficient reason for dismissing the

proceeding. (*Lux v. Haggin*, 69 Cal. 255, [4 Pac. 919, 10 Pac. 674].) It is well settled, however, that courts of equity will often refuse relief even where the statutory time of limitation has not run. "There must be something more than a mere passive neglect. There must be, in addition, a showing of facts amounting to acquiescence in the acts complained of, or of other circumstances which, coupled with the delay, will render the granting of the relief inequitable. (*Lux v. Haggin*, 69 Cal. 255, [4 Pac. 919, 10 Pac. 674].) In *Chapman v. Bank of California*, 97 Cal. 155, 159, [31 Pac. 896], the court says: "Regardless of the question as to whether there has been a plea of the statute of limitations, a court of equity will refuse to entertain a suit brought after unreasonable delay. (*Harris v. Hillegass*, 66 Cal. 79, [4 Pac. 987]; *Bell v. Hudson*, 73 Cal. 287, [2 Am. St. Rep. 791, 14 Pac. 791].) The refusal to grant relief is not put upon the presumption of payment or analogy to the statute of limitations, but upon considerations of public policy, and the difficulty of doing entire justice between the parties in consequence of the unreasonable delay. The principal factors in determining whether the plaintiff had been guilty of laches are acquiescence and lapse of time; but other circumstances are also material, such as that a change in the value or the character of the property has taken place. The matter is one which is left to the sound discretion of the chancellor in each case."

These principles have been applied with perhaps more than ordinary strictness to the case of a cotenant demanding the benefit of a purchase by the other cotenants. "The right of a cotenant to share in the benefit of a purchase of an outstanding claim, is always dependent upon his having within a reasonable time, elected to bear his portion of the expense necessarily incurred in the acquisition of the claim. . . . The cotenant asking a court of equity to award him the benefit of a purchase, must show reasonable diligence in making his election. Whatever delay he may have occasioned must be entirely consistent with perfect fair dealing on his part and in no wise attributable to an effort to retain the advantages while he shirks the responsibilities of the new acquisition." (Freeman on Cotenancy and Partition, 2d ed., sec. 156.) In *Mandeville v. Solomon*, 39 Cal. 125, this court said: "Equity does not deny to a tenant in common the right to purchase

in an outstanding or adverse claim to the common property; it however deals with the tenants after such a purchase is made. While it will not permit one of them to acquire such a title solely for his own benefit, or to the absolute exclusion of the other, it at the same time exacts of that other the exercise of reasonable diligence in making his election to participate in the benefit of the new acquisition; and having, upon its own principles of fair dealing, compelled the purchasing tenant to allow his cotenant this opportunity, the latter will not be permitted to equivocate or trifle with the position thus afforded him, or to make it a means of speculation for himself, by delaying, until the rise of the land or some event yet in the future shall determine his course. Unless he make his election to participate within a reasonable time, and contributes or offers to contribute his ratio of the consideration actually paid, he will be deemed to have repudiated the transaction and abandoned its benefits." (See, also, 17 Am. & Eng. Ency of Law, 2d ed., p. 679; *Stevens v. Reynolds*, 143 Ind. 467, [52 Am. St. Rep. 422, 41 N. E. 931]; *Reed v. Reed*, 122 Mich. 77, [80 Am. St. Rep. 541, 80 N. W. 996]; *Buchanan v. King*, 22 Grat. 414; *Morris v. Roseberry*, 46 W. Va. 24, [32 S. E. 1019]; *McFarlin v. Leaman*, [Tex. Civ. App.] 29 S. W. 44.)

We think the facts shown in the case at bar are clearly sufficient to justify the conclusion of the court, that so far as the defendant Josephine Porter Boyd is concerned, the delay of the plaintiff was so great as to deprive her of the right to seek the relief here demanded. It is not disputed that the plaintiff knew of the trustees' sale and of the conveyance by the Bank of Selma to the defendants at the time these transactions took place. In the meanwhile, the respondent has purchased the interest of her cotenant, has cultivated and cared for the land, has made some improvements upon it, and taken the risks of declining values and failure of crops. It is in evidence, and it is found by the court, that property of this character was in little demand at the time of the sale. Since such sale it has increased greatly in value, until at the time of the trial it had more than doubled in value. We cannot doubt that the court below was fully justified in finding that a delay of almost four years was unreasonable under these circumstances. To permit the plaintiff now to reinstate

herself as the owner of an undivided one-half interest in the land, upon payment of one half of the amount paid at the trustees' sale, thereby securing to herself the full benefit of the increase in the value of the land, without having undergone any of the risks connected with its holding and cultivation, would manifestly be inequitable.

The appellant points out certain facts, which, it is alleged, should have been held to have excused the delay in seeking relief. But whether or not, under all the circumstances, the delay has been such as to render it inequitable to grant the relief is, in the first instance, a question for the trial court, the determination of which is left, as is said in *Chapman v. Bank of California*, 97 Cal. 155, 159, [31 Pac. 896], "to the sound discretion of the chancellor in each case." The matters relied on by appellant as explaining her delay were proper to be considered by the court below, but, without stating them at length, we are compelled to say that, giving due effect to all of them, they were not of such character as to require that court to conclude that, at least as against the respondent, Josephine Porter Boyd, the plaintiff had not slept on her rights to such an extent as to require the denial of relief.

Our views on this point make it unnecessary to consider any of the other contentions urged by counsel.

The judgment is affirmed.

Angellotti, J., and Shaw, J., concurred.

Hearing in Bank denied.

[S. F. No. 4692. Department One.—May 26, 1908.]

F. P. MARINOVICH, Respondent, v. F. A. KILBURN,
Appellant.

ACTION UPON CONTRACT TO PURCHASE STOCK—INDEPENDENT AGREEMENT
—EVIDENCE—VARIANCE NOT SHOWN.—In an action upon an alleged contract to purchase fifty shares of stock in a corporation at sixty dollars per share, in case of any default in the payment of an annual dividend of not less than three and one half per cent on

each of said shares, at that price, it being alleged that no dividends were paid, where the contract offered in evidence to prove the cause of action alleged, contained an independent agreement to make good each annual dividend, in event of non-payment thereof at the rate of three and a half per cent upon plaintiff's investment, it does not establish any variance.

ID.—WANT OF CONSIDERATION OF CONTRACT OF PURCHASE—PERFORMANCE OF PLAINTIFF'S OBLIGATION.—Where plaintiff had only paid seven hundred and fifty dollars on account of the purchase of fifty shares of stock at a price of three thousand dollars, and the contract was made by defendant to repurchase the stock, to induce the defendant to perform his obligation to pay up his subscription to the stock, neither the existence of that duty, nor the performance of it by the plaintiff would constitute any consideration for the contract by defendant to purchase the stock.

ID.—CONTRACT INDUCED BY FRAUD—EVIDENCE—QUESTION FOR JURY.—Where there was some evidence tending to show that the contract by the plaintiff to buy the stock was induced by defendant's fraud, and the evidence was conflicting as to whether the fraud was connected with defendant's agreement to buy the stock, the court should have left the question to the jury under proper instructions.

ID.—ERRONEOUS INSTRUCTIONS—FRAUD BEARING ON CONSIDERATION.—After the court had properly instructed the jury as to the insufficiency of plaintiff's obligation to pay up his subscription to stock as a consideration, it was erroneous to instruct them, in effect, that the mere existence of the fact, if found by them, that plaintiff was induced to buy the stock from the company solely by the fraud of the defendant, constituted a sufficient consideration for defendant's subsequent contract to buy the stock, without providing for any finding as to the connection of the fraud with such contract.

APPEAL from a judgment of the Superior Court of Santa Cruz County and from an order denying a new trial. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

Wyckoff & Gardner, for Appellant.

Chas. M. Cassin, and Cassin & Lucas, for Respondent.

SHAW, J.—Appeal by the defendant from the judgment and from an order denying his motion for a new trial.

On July 21, 1903, the defendant executed the following contract in writing:—

"Whereas, F. P. Marinovich is the owner of fifty shares of the capital stock of the Watsonville Transportation Company, for which he has paid the sum of \$3,000.00, or \$60.00 per share, in full payment therefor:

"Now, these presents witnesseth: That in the event of the non-payment of an annual dividend of not less than three and one half per cent upon the purchase price of said stock, I hereby agree to pay to F. P. Marinovich that sum, viz: three and one half per cent upon his investment of \$3,000.00, in said stock, myself.

"I further agree that in the case of any default in the payment of an annual dividend of not less than three and one half per cent upon each of the fifty shares of said stock owned by said F. P. Marinovich, to purchase the same at any time he may request me to do so, after such default; and to pay therefor the sum of \$60.00 per share spot cash, upon the delivery to me of the certificate of stock properly indorsed."

The company never paid any dividend upon the stock, whereupon, on March 30, 1905, the plaintiff tendered to defendant his certificate of stock, properly indorsed, and demanded that defendant then and there repurchase said stock and pay plaintiff three thousand dollars therefor. Defendant refused and the plaintiff began this action to recover the price so agreed upon. The action was tried by a jury, which returned a verdict for the plaintiff for three thousand dollars.

The complaint declared upon the above contract according to its legal effect, averring, in substance, that the defendant thereby agreed to purchase the fifty shares of stock in question at the price of three thousand dollars, if the company did not pay an annual dividend of not less than three and one half per cent upon said stock. Upon the trial, the introduction of the contract in evidence, in support of the allegation, was objected to on the ground that there was a variance between the contract alleged and that offered in proof, and the objection was overruled.

The claim that there is a variance is made upon the theory that the agreement does not bind Kilburn to buy the stock, except upon the failure of the company to pay an annual dividend equal to one hundred and five dollars, and his own failure to make it good. It cannot properly be so construed.

Kilburn agreed to make the yearly dividend good to the extent of one hundred and five dollars, or three and one half per cent of three thousand dollars, in the event that the company failed to pay a dividend of that amount upon plaintiff's stock of the par value of five thousand dollars. He agreed to buy plaintiff's stock, not upon the failure of the company to pay an annual dividend of one hundred and five dollars upon that stock, coupled with his own failure to make it good, but upon plaintiff's request "in the case of *any default* in the payment of an annual dividend of not less than three and one half per cent *upon each of the fifty shares of said stock owned by*" plaintiff, without any reference to the added failure of Kilburn to make it good to the extent of one hundred and five dollars. The two provisions relate to different events and are independent of each other. The payment claimed to have been made by Kilburn of a sum equal to three and one half per cent upon the three thousand dollars invested by Marinovich, on failure of dividends by the company, as provided in the first clause of the agreement, did not relieve him of his obligation to buy the stock, imposed on him by the last clause in case of such failure by the company. Plaintiff's right to insist on the sale to Kilburn was made to depend solely on the failure of the company to pay the required dividend, and not at all upon the added failure of Kilburn to make good the company's default. There was no variance.

The defense chiefly relied on was want of consideration. The plaintiff had bought the stock from the company at the price of three thousand dollars, paying therefor at the time of purchase the sum of seven hundred and fifty dollars. In July, 1903, the company was urging Marinovich to pay the two thousand two hundred and fifty dollars remaining unpaid upon the purchase price, and plaintiff refused to pay it, stating as his reason that he had heard that there was going to be promoters' stock issued. The defendant was a director of the company and much interested therein. He thereupon, in order to induce plaintiff to pay to the company the balance of his stock subscription, executed the contract sued on, and plaintiff, in consideration thereof, paid said sum of two thousand two hundred and fifty dollars to the company, and thereupon his certificate was by the company indorsed as fully paid stock.

The principal contention of the plaintiff, upon this appeal, is that the fact that the plaintiff was unwilling to perform his contract to pay to the company the balance of his subscription, and was refusing to do so, and the fact that he agreed to, and did, perform it because of the agreement sued on, constituted a sufficient consideration for the agreement on the part of Kilburn to buy the stock and pay him three thousand dollars therefor. We think this proposition is not tenable. This court has said, "It is well settled that neither a promise to perform a duty, nor the performance of a duty, constitutes a consideration of a contract." (*Sullivan v. Sullivan*, 99 Cal. 193, [33 Pac. 862].) In *Ellison v. Jackson Water Company*, 12 Cal. 553, Ellison was bound by contract to do certain work for the Jackson Water Company. Thereafter, one Bayerque, a defendant in the action, promised that if Ellison would proceed with the work, he, Bayerque, would pay to Ellison the amount due under the contract. The court says: "A promise to Bayerque to perform this contract could furnish no consideration for a promise by him. The consideration of the original contract could not attach to the subsequent promise." (The italics are ours.) In *Schuler v. Myton*, 48 Kan. 282, [29 Pac. 165], the principle is thus stated: "An agreement to do, or the doing of, that which one is already bound to do, does not constitute a consideration for a new promise." To the same effect, see 6 Am. & Eng. Ency. of Law, p. 752; 9 Cyc. 354, and many cases cited therein. In the case at bar the plaintiff was already under obligation to the company to pay the balance of his subscription. According to this contention all he agreed to do in consideration of the agreement of Kilburn was to pay the obligation to which he was already bound. The case comes precisely within the principle above stated. We cannot perceive anything in section 1605 of the Civil Code contrary to the principle just stated. Upon the theory we are now discussing, no benefit would accrue to Kilburn by the payment of the stock subscription, beyond that which he was already entitled to as a stockholder in the company, and no prejudice would be caused to Kilburn by the payment of the stock subscription, except that which he was already bound to suffer.

The plaintiff in support of his contention cites the case of *Abbott v. Doane*, 163 Mass. 433, [47 Am. St. Rep. 465, 40

N. E. 197], and other cases in Massachusetts and in England. These cases support the proposition as contended for, but they are contrary to the general current of authority and to the decisions above quoted in this state. (9 Cyc. 354; 6 Am. & Eng. Ency. of Law, p. 752.)

Plaintiff further claims that the evidence shows that he was induced by fraud to buy the stock from the company, that he was claiming a right to refuse to complete his purchase because of this fraud; that Kilburn by the agreement sued on induced him to waive his objections and any defense founded on such fraud and forthwith to pay the balance due on his subscription, and that upon this theory there was good consideration for the agreement. It may be conceded that there was some foundation in the evidence for this claim. It is not necessary here to recite the evidence nor to consider its sufficiency upon the subject, for we find that the court gave the jury an erroneous instruction relating thereto.

After correctly stating to the jury that if the only consideration for Kilburn's contract to buy the stock of plaintiff was the payment by plaintiff to the company of the balance of his stock subscription for which he was already bound, then there was no sufficient consideration for Kilburn's agreement, the court added the following:—

“However, if you find that the defendant represented to the plaintiff before the plaintiff subscribed for any stock of the Watsonville Transportation Company that there would not be issued any promotion stock, and that said plaintiff believed said representation and acted upon it and by reason thereof subscribed for said fifty shares of stock, and would not have subscribed for them but on account of said representations, and if you further believe that a large amount of promotion stock was issued and delivered by said corporation to different persons, then I instruct you that there was a sufficient consideration for the execution of said agreement.”

The vice in this instruction is that it directs the jury that the mere existence of the fact that plaintiff was induced to buy the stock from the company solely by the fraud of the defendant, constituted a sufficient consideration for the defendant's subsequent agreement to buy the stock from plaintiff. This could not be a correct proposition of law as applied to this case, unless the fraud referred to was in some way

connected with Kilburn's agreement, as, for example, that plaintiff in consideration of that agreement waived his claim that he had a good defense against his obligation to pay for his stock and made such payment accordingly. But upon this point the evidence was conflicting. The testimony of the plaintiff tended in some degree to support the proposition, but there was other evidence to the effect that the plaintiff based his refusal to pay for the stock solely upon the ground that he thought it was a poor investment. Conceding, but not deciding, that there was evidence sufficient to establish the fraud referred to, the question whether or not his refusal to complete the contract was based on his complaint of fraud in inducing him to purchase it or upon other reasons not connected with the fraud, should have been submitted to the jury.

Certain errors in rulings upon the admission and rejection of evidence are complained of, but in view of the fact that the case must be reversed and remanded for a new trial, and it is not probable that the rulings will be repeated, we think it unnecessary to consider them.

The judgment and order are reversed.

Angellotti, J., and Sloss, J., concurred.

[S. F. No. 4594. Department Two.—May 28, 1908.]

CITY AND COUNTY OF SAN FRANCISCO, Respondent,
v. YANKEE BROWN et al., Appellants.

JUDGMENTS—VACATION OF JUDGMENT OTHER THAN ONE RENDERED—
ERROR OF CLERK—COURT'S POWER OF CORRECTION AFTER SIX
MONTHS.—Where the clerk of the court, at the request of defend-
ants' attorney, entered a judgment different from that rendered
by the court, the error is clerical, and not judicial; and the court
has power to vacate it, on plaintiff's motion, at any time, and has
inherent power to correct it so as to conform to the judgment ren-
dered, notwithstanding the lapse of six months, which period has no
application to the case.

EJECTMENT—JUDGMENT OF NONSUIT—DISMISSAL—TITLE NOT DETER-
MINED—JUDGMENT NO BAR TO SECOND ACTION.—A judgment of non-

suit rendered in an action of ejectment, on motion of the defendants, decides nothing on the merits of the case, and determines nothing as to the title of plaintiff, or defendants; but it simply operates as a dismissal of the case for want of sufficient proof as to the title of the plaintiff, and is not a bar to a subsequent action by the plaintiff upon the same cause of action.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Robert Ash, for Appellants.

Wm. G. Burke, City Attorney, for Respondent.

LORIGAN, J.—This is an appeal from an order setting aside and vacating a final judgment. The action was commenced in the district court of the fourth judicial district on the seventeenth day of April, 1868, and was in ejectment, to recover possession of certain premises in the city and county of San Francisco, of which plaintiff alleged it was the owner and entitled to the possession, and had been dispossessed by the defendants, and which property, the record on this appeal shows, was claimed to be a portion of Oregon Street. In due time Charles P. Brown and Andrew V. Smith, impleaded with the other defendants under fictitious names, filed their answers, in which they denied the allegations of the complaint, and set up as separate defenses the statute of limitations and adverse possession for the requisite statutory period. The cause came on regularly for trial without a jury on the sixteenth day of November, 1870, and plaintiff resting after having introduced certain evidence, the defendants moved for a judgment of nonsuit. The minute orders of the court with reference to the motion and disposition of it were, that certain named "witnesses for plaintiff were sworn and examined, and plaintiff having rested his case, defendants moved for a judgment of nonsuit, which motion was taken under advisement by the court." This is from the minutes of the trial of November 16, 1870. On November 19, 1870, the following minute order was made by the court: "The motion on behalf of defendants for a judgment of nonsuit herein having been fully considered by the court, it is ordered

that the said motion be and the same is hereby granted, and that a judgment of nonsuit be entered therein in favor of said defendants and against the plaintiff."

No further proceedings seem to have been taken in the case until the thirty-first day of March, 1905, when Robert Ash, Esq., attorney of record for appellant herein, without any stipulation or order of substitution as attorney for said defendant Brown, wrote in the request book kept in the county clerk's office the following: "Enter judgment as per memorandum filed. Robert Ash, Attorney." Thereafter, On April 4, 1905, the clerk, without any order or direction of the superior court, entered judgment in the cause pursuant to the directions of said attorney who had requested it.

The judgment recited that the cause having come on regularly to be heard on the nineteenth day of November, 1870, "the parties thereupon introduced oral and documentary evidence, and there was thereupon put in issue between the respective plaintiff and said defendant C. P. Brown the title and possession of said parties respectively in and to" the land described in the complaint. It further recites that "after said evidence had been closed, defendants moved for a nonsuit on the ground that plaintiff had no title to said lot of land, which the court had granted, and rendered judgment in favor of said defendants and against said plaintiff for the possession of the . . . described premises." The judgment then "ordered, adjudged and decreed that the defendant C. P. Brown is the owner and entitled to the possession of said lot of land described and entitled to recover his costs herein."

On November 17, 1905, the said attorney of plaintiff, pursuant to notice regularly served on said Robert Ash, as attorney for defendants, moved in the superior court of the city and county of San Francisco, where such judgment had been entered, for an order vacating the judgment as entered in said action of April 4, 1905, and for a further order directing that judgment be entered in conformity with the decree of the district court rendered in said action November 19, 1870, on the ground that the judgment as entered on April 4, 1905, did not conform to the decision of the court rendered on November 19, 1870. After hearing the court made the order as prayed for to the extent of vacating the judgment of April 4, 1905.

The only question involved on this appeal is as to the jurisdiction of the superior court to make the order vacating the judgment.

It is insisted by appellant against such jurisdiction, 1. That the court had no power after the expiration of six months from the entry of the judgment, April 4, 1905, to vacate it on motion; and, 2. That if there was error in the judgment as entered it was judicial error and not clerical error or misprision, and, hence, could not be corrected by motion to vacate the judgment, but only on motion for a new trial or on appeal.

Both propositions of appellant in so far as they embrace rules of law are correct, but we are satisfied that neither of them has application in the matter under consideration.

The rule that a motion to vacate a judgment cannot be made after six months from its entry has application only where the judgment which it is sought to vacate is the judgment which was actually rendered by the court. But here it is apparent that the judgment which was entered was not the judgment rendered by the court. The judgment as rendered was one of nonsuit only, the effect of which was simply to declare that the plaintiff had failed to make proof of material allegations necessary to sustain his cause of action. It decided nothing on the merits of the controversy, and necessarily could not, as its effect was to virtually put the plaintiff out of court. It operated simply as a dismissal of the case. (*Wood v. Ramond*, 42 Cal. 643.)

And a nonsuit suffered for any cause is not a bar to a suit subsequently brought on the same cause of action. (*Merritt v. Campbell*, 47 Cal. 543.)

This being the law, a nonsuit granted in an action of ejectment determines nothing save that the plaintiff has not proven his case as alleged. The plaintiff in such an action must recover on the strength of his own title, and failing in proof of his title is subject to be nonsuited, but the presence or absence of title in the defendants does not enter at all in the determination as to whether such nonsuit should be granted, and is, of course, not considered or determined in the matter of the nonsuit. The defendant in an ejectment suit may have no title whatever or right to possession of the property, but this is entirely immaterial if the plaintiff proves no title or right of possession. He can only prevail by showing it in

himself, and it is immaterial for all purposes if he fails in this respect whether defendant has title or not.

Now, applying these principles to the matter under consideration. It may be that in fact the city of San Francisco had a perfect legal title and right to the possession of the premises in controversy, but may have failed on the trial in making the necessary proof in that respect. The nonsuit did not determine that it had no such title or right, but only that if it had it had not proven it, and went out of court for that reason. This was, however, by no means an adjudication that the title to the premises was in Brown, for a judgment of nonsuit could be entirely proper and Brown have no shadow or pretense of title. If it could be held that the nonsuit was determinative of title in Brown, then it would be necessarily *res adjudicata* on the subject of title, and would be a bar to the maintenance by plaintiff of another action of ejectment for the recovery of the property. This, however, could not be, because it is fundamental that the doctrine of *res adjudicata* has no application to judgments of nonsuit. (*Merritt v. Campbell*, 47 Cal. 543.) Or, again, as far as the necessity of proof of title on the part of plaintiff is concerned, it might have been that the nonsuit was properly granted because the title appeared from the proofs of plaintiff to be in a stranger to the action, or in one of the other defendants who had appeared in the case, either Eliza Brown or A. V. Smith.

It is thus apparent that the judgment of nonsuit in an action of ejectment determines nothing except that the plaintiff has not proven his right to recover as alleged, and his action is dismissed and he is sent out of court for such failure. It determines nothing whatever as to title, nor is it conclusive in any respect upon that question.

This being the effect of the order for a nonsuit by the district court on November 19, 1870, the judgment entered thereon by the clerk at the direction of Attorney Ash on April 4, 1905, adjudicating that the appellant Brown was the owner and entitled to the possession of the premises described in the complaint was essentially a different and distinct judgment from that which was rendered by the district court, and was entered unauthorized.

Concluding, then, that the judgment entered was different from that which was rendered, brings us to a consideration of

the second contention of appellant,—namely, that if there was any error in entering the judgment it was not a clerical error or misprision, but a judicial error which was subject to correction on motion for a new trial, or on appeal, only.

We cannot perceive how any claim that the entry of the judgment was judicial is maintainable. There was no error in the judgment as rendered. The error was in entering a different judgment from that which the court had ordered. The entry of the judgment was a matter with which the court had nothing to do. It was a ministerial act to be performed by the clerk, and his duty was to enter only such judgment as the court had rendered.

Counsel for appellant cites several cases which he claims support his contention that the entry was judicial error. The only ones which have any relevancy to the point are *Egan v. Egan*, 90 Cal. 21, [27 Pac. 22]; *First Nat. Bank of Fresno v. Dusy*, 110 Cal. 69, [42 Pac. 476]; and *Byrne v. Hoag*, 116 Cal. 1, [47 Pac. 775]. An examination of these cases shows that they are not authority for the proposition he advances, but inferentially are authorities against him. In all those cases the judgments were entered exactly as the court had ordered them, and the language used in *Byrne v. Hoag*, 116 Cal. 1, [47 Pac. 775], "the judgment was entered by the clerk exactly as the court ordered it to be entered in the surest way in which the judge could express his intention" is applicable to them all. Certainly such authorities can have no bearing where it is clear that the clerk entered a judgment entirely different from what the court had rendered.

This is what the clerk did here, and it is clear from the authorities that in entering judgment the clerk acts in a purely ministerial capacity and that no judicial function is exercised. On this point it is said in *Kelly v. Van Austin*, 17 Cal. 565: "The clerk in entering judgments upon default acts in a mere ministerial capacity. He exercises no judicial functions. The statute authorizes the judgment, and the clerk is only an agent by whom it is written out and placed among the records of the court. He must, therefore, conform strictly to the provisions of the statute, or his proceedings will be without any binding force." In *Crim v. Kessing*, 89 Cal. 488, [23 Am. St. Rep. 491, 26 Pac. 1074], it was held: "The entry of a judgment after it has been rendered by the court is but the

ministerial act of the clerk. The judgment, when entered, becomes the record of what the court has determined, and then becomes as binding upon the parties as if entered immediately upon its rendition. "The rendition of a judgment is a judicial act; its entry upon the record is merely ministerial." (Free-man on Judgments, sec. 38.)"

As the court has nothing to do with the entry of a judgment, that being a duty devolving solely on the clerk of the court, it follows under the authorities cited that the act of the clerk in the matter at bar in entering a judgment at the request of the attorney different from that which had been rendered by the court was not a judicial error, but strictly a clerical one.

This being true, the rule is unquestioned that a court of record has the inherent right and power at any time to correct or amend its judgment which has been entered as the result of clerical error or misprision in order to make it conform to the judgment which was actually rendered by the court, and so as to speak the truth in that respect.

"A judgment is the decision or sentence of the law, given by a court or competent tribunal, as the result of proceedings instituted therein for the redress of an injury.' To be valid, it must be given by a competent judge or court, at a time and place appointed by law, and in the form it requires, and is usually entered up by the clerk, under the supervision of the court. Our statute, like that of many states, has introduced a new rule, adapted to the convenience of the public, and pronounces a judgment of law upon a certain state of facts, which, when duly authenticated, authorizes the clerk to enter judgment thereon. If a judgment is pronounced by a court having jurisdiction, no matter how irregular it may be, it must stand until set aside or reversed on appeal; but when entered by a mere ministerial officer, without authority of law, it is wholly void. (*Stearns v. Aguirre*, 7 Cal. 449.)

"Clerical errors and misprisions may occur in respect of entries of judgments, which it is competent for the court to order amended or supplied; and this may be done even though the term when the error or mistake happened may have passed, provided the party moving proceeds with due diligence." (*Hagler v. Henckell*, 27 Cal. 491.)

"It is well settled that clerical errors in a judgment, where they show by the record, may be corrected at any time so as to make the judgment entry correspond with the judgment rendered. (*Swain v. Naglee*, 19 Cal. 127; *Freeman on Judgments*, secs. 70, 71.) And this may be done even after an appeal and affirmance of the judgment. (*Rousset v. Boyle*, 45 Cal. 64.)" (*Dreyfuss v. Tompkins*, 67 Cal. 340, [7 Pac. 732].)

"Courts have the power at all times to allow amendments to judgments for the purpose of having the judgment as entered express that which was rendered, so that the record shall contain the actual decision of the court; and such amendment can be made after the expiration of six months from the entry of the judgment. Where the clerk fails to enter judgment as it was pronounced, the court has always the power to correct the matter and order the proper entry to be made." (*Egan v. Egan*, 90 Cal. 15, [27 Pac. 22].)

"Every court of record has the inherent right and power to cause its acts and proceedings to be correctly set forth in its records. The clerk is but an instrument and assistant of the court, whose duty it is to make a correct memorial of its orders and directions; and, whenever it is properly brought to the knowledge of the court that the record made by the clerk does not correctly show the order or direction which was in fact made by the court at the time it was given, the authority of the court to cause its records to be corrected in accordance with the facts is undoubted. (*Matter of Wright*, 134 U. S. 136, [10 Sup. Ct. 487]; *Balch v. Shaw*, 7 Cush. 282; *Fay v. Wenzell*, 8 Cush. 315; *Frink v. Frink*, 43 N. H. 508, [80 Am. Dec. 189, 82 Am. Dec. 172]; *Crim v. Kessing*, 89 Cal. 486, [23 Am. St. Rep. 491, 26 Pac. 1074].)" (*Kaufman v. Shain*, 111 Cal. 19, [52 Am. St. Rep. 139, 43 Pac. 393].)

"A court may at any time amend a judgment where the record discloses that the entry on the minutes does not correctly give what was the judgment of the court. (*Morrison v. Dapman*, 3 Cal. 255.)" (*Scamman v. Bonslett*, 118 Cal. 97, [62 Am. St. Rep. 226, 50 Pac. 272].)

These are quotations from but a few of a long line of authorities in this state uniformly sustaining the doctrine which these quotations announce, and under them it is quite evident that the judgment entered by the clerk on April 4, 1905, was not

the judgment rendered by the court on November 19, 1870. It was clerical error on the part of the clerk to so enter a different judgment, and the court was authorized and had jurisdiction on motion of plaintiff to set it aside in order that a judgment conformable to that which was in fact ordered might be actually entered.

The order appealed from is affirmed.

Henshaw, J., and McFarland, J., concurred.

[S. F. No. 4874. Department Two.—May 28, 1908.]

In the Matter of the Estate of BERTHA M. DOLBEER, Deceased. HORATIO SCHANDER, Contestant, Appellant; ETTA MARION WARREN, Proponent of Will, Respondent.

WILLS—RESULT OF PRIOR CONTEST—CONTEST AFTER PROBATE—WANT OF MENTAL CAPACITY—UNDUE INFLUENCE—INSUFFICIENT EVIDENCE.—

Where a will had been contested before probate solely for want of capacity of the testatrix, by an uncle, and a verdict for the will was found on that issue, and the judge properly found *ex parte* in favor of the presumption against undue influence, and the will was contested after probate, by another uncle both for want of mental capacity and for undue influence; *Held*, that the evidence was insufficient upon the second contest to establish either ground, and that a showing of the mere possibility of undue influence or opportunity therefore was not sufficient to establish it.

ID.—MOTION TO CHANGE VENUE OF SECOND CONTEST—DISQUALIFICATION OF JUDGE NOT SHOWN.—Where the contestant after probate moved to change the venue upon affidavits that the judge had expressed a fixed opinion in favor of the validity of the will and was biased and prejudiced against the second contest, without charging any bias or prejudice against the litigant, the showing is insufficient to disqualify the judge from trying the second contest, and the motion was properly denied.

ID.—FINDING MADE ON FORMER CONTEST—BIAS AND PREJUDICE NOT IMPUTABLE ON SECOND CONTEST.—The circumstance that the court, on the former contest, upon which the question of undue influence was not in issue, in its formal proof of facts found that the will was executed by the deceased when free from undue influence, merely upon the legal presumption of the absence of fraud or undue influence, where there is failure of allegation or proof of either, can under no circumstances be the foundation for the imputation of bias

or prejudice on that account, upon the second contest, on an issue expressly joined upon that question.

ID.—JURY TRIAL NOT REQUIRED ON SECOND CONTEST.—The right to a jury trial in probate proceedings is purely statutory, and does not exist if the statute does not provide for it. Where a jury trial was had upon a contest before probate, the right does not exist upon a second contest after probate under section 1330 of the Code of Civil Procedure.

ID.—CONSTRUCTION OF CODE.—The special provision in section 1330 of the Code of Civil Procedure, is the latest expression of the legislative will as to a jury trial on a second contest of a will. Furthermore, that special provision in article IV of chapter II must prevail over general provisions as to jury trials, in sections 1716 and 1717 of the same code.

ID.—DISCRETION AS TO JURY TRIAL ON SECOND CONTEST—FACTS CONSIDERED—POLICY OF LAW—CURTAILMENT OF DILATORY PROCEEDINGS—TRIAL BY COURT.—Upon the question of discretion of the court as to a jury trial of the second contest, after probate, by a brother of the first contestant, it is to be considered that the second contestant was familiar with the facts concerning the jury trial had upon the first contest before probate, and its final result in favor of the validity of the will. In view of such jury trial and its result, it is the policy of the law to curtail further dilatory proceedings in the settlement of the estate, and that subsequent contests should be expeditiously tried by the court. It was not an abuse of discretion, but within the well-defined policy of the law, for the court to refuse a jury trial under the circumstances shown.

ID.—CITATION OF PARTIES INTERESTED—SERVICE UPON ALL HEIRS NOT ESSENTIAL—ABSENCE OF INJURY TO CONTESTANT.—Section 1329 of the Civil Code as to the citation of parties interested does not contemplate or require the delay of the proceedings to obtain service of all other heirs who are not provided for in the will, and whose interest is with that of the contestant. Such other heirs are proper, but not necessary parties, and where the contestant failed in his contest, he is not injured by the failure to serve other heirs with citation.

ID.—EVIDENCE—EXAMINATION OF BENEFICIARY BY CONTESTANT—DEPOSITION—SURPRISE—CONTRARY DECLARATIONS INADMISSIBLE.—Where the principal beneficiary charged with undue influence, was called as a witness for contestant, the contestant cannot be surprised by evidence conforming to her deposition, nor can the contestant, on the ground of surprise at her answers, offer contrary declarations made out of court, if the exceptional case does not appear that, by surprise, the witness has given affirmative hostile and admissible evidence unexpectedly, which such declarations could neutralize.

ID.—QUESTIONS CALLING FOR HEARSAY TESTIMONY.—Questions calling for hearsay testimony are inadmissible on that ground, and can-

not form ground for introducing contrary declarations on the ground of surprise.

ID.—DECLARATIONS OF ONE LEGATEE NOT ADMISSIBLE.—Declarations by one legatee are not admissible in evidence because not binding upon the other legatees, and the same rule holds whether the evidence is addressed to the mental unsoundness of the testatrix or to the question of undue influence.

ID.—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—INSUFFICIENT AFFIDAVITS.—Motions for a new trial on the ground of newly discovered evidence are always subject to careful scrutiny by the court, and the decision rests on its sound discretion. It is held that, not only was there no abuse of discretion in denying the motion, in this case, but also, that there is nothing contained in the affidavits which would have justified the court in granting a new trial on the ground of newly discovered evidence.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a new trial of a contest of a will after probate. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

Further facts are stated in *Estate of Dolbeer*, 149 Cal. 227, [86 Pac. 695].

Darwin C. De Golia, Bart Burke, Charles J. Pence, and S. C. Denson, for Appellant.

E. S. Pillsbury, Garret W. McEnerney, and Joseph H. Mayer, for Respondent.

HENSHAW, J.—This was a contest of the will of Bertha M. Dolbeer, deceased, instituted after its admission to probate. The grounds of the contest were the mental incapacity of the deceased to execute a will and alleged undue influence exercised upon the mind of the testatrix by Etta Marion Warren, the principal beneficiary of the testatrix's bounty. In *Estate of Dolbeer*, 149 Cal. 227, [86 Pac. 695], this court considered the contest of Adolph Schander before the probate of Bertha M. Dolbeer's will. The present contest was instituted by another maternal uncle of Bertha M. Dolbeer, Horatio Schander. It was tried by the court without a jury, and determined adversely to contestant. From the judgment denying the petition for revocation an appeal was taken, which appeal was by this court dismissed. The present

appeal is taken from the order of the court denying petitioner's motion for a new trial because of asserted errors of law committed at the trial, and upon alleged newly discovered evidence.

For the history and facts in this matter reference may be made to the *Estate of Dolbeer* in the 149th volume of our reports. It may be added that upon the question of the insanity of the deceased the evidence in the present case is certainly no stronger, if not much weaker, than the evidence adduced upon the former contest. Of direct evidence touching undue influence there is nothing worthy of the name, and indeed there is nothing at all upon this branch of the case other than the inferences which might be drawn from the two facts—the opportunity for exercising such influence and the circumstance that the will makes Miss Warren the principal beneficiary. But these facts are wholly insufficient to support the charge, and, as was declared in the earlier contest, the will of deceased was not an unnatural one.

With this brief statement we come to a review of the alleged errors of law committed by the trial court, and the first of these is based upon the court's refusal to grant a change of venue. Judge Coffey presided over the department of the probate court before which the first contest upon the admission of the will to probate was heard and determined before a jury. The sole issue there presented was that of the mental capacity of the testatrix to execute a will. The jury found the testatrix at the time of the making of the will to be of sound and disposing mind. In the proof of facts found, the judge properly, indeed necessarily, added the formal finding, made *ex parte* (there being no controversy upon the question), that the testatrix was free from undue influence in the making of the will. The only pertinent allegations in the affidavits touching the disqualification of the judge are that the judge "has used language indicating that he has formed a fixed opinion concerning the validity of said alleged will of decedent," and further that the judge has "shown his position as to the merits of the affiant's contest, and shown his prejudice and bias against this affiant's said contest" by fixing the return day of the citation for a date ten days after its issuance, notwithstanding the fact that Ida J. Moody, one of the heirs at law of Bertha M. Dolbeer, was at that time in

Europe, and that service of said citation therefore could not be personally made upon her, and that since then the court has refused to delay the hearing of the case by issuing an alias citation to bring Mrs. Moody into court, notwithstanding that application had been made therefor. It is to be here noted that it is not charged that the bias of the judge is directed against the contestant or his attorneys, but simply that it is directed against the case. The return day of the original citation granted contestant reasonable time to serve all parties within the jurisdiction of the court, and the refusal to issue an alias citation for Mrs. Moody was, as will be considered hereafter, entirely proper. These alleged grounds of prejudice may at once be eliminated. The circumstance that the court, in its formal proof of facts, found upon the former contest that the will was executed by Miss Dolbeer when free from undue influence, can under no circumstances be the foundation for the imputation of bias or prejudice upon this account, since in that contest the question of undue influence was not in issue, and the court found merely upon the legal presumption of the absence of fraud or undue influence where there is failure of allegation and proof of either. There is thus left the single proposition that the judge was biased and prejudiced "against this contest" (wherein the probate of the will was sought to be revoked upon the ground that the testatrix was insane), because before a jury a similar or like contest upon the same ground had been tried and determined in his court favorably to the proponents of the will. But this alleged prejudice of a judge against a case, as distinguished from prejudice against a litigant, has never been recognized as a sound basis for a motion for change of venue or the amotion of the judge. Were it otherwise, it would prohibit any judge from sitting in the second trial of a cause which had previously been determined by him, since in the first trial he must have reached his own conclusions as to the law and the facts, to the so-called prejudice of one or another of the litigants. Says the supreme court of Vermont: "There is no rule or principle that disqualifies the judge of a court from sitting in different causes in which the same legal rules and questions of fact, or either of them, are presented for consideration." (*Martyn v. Curtis*, 68 Vt. 397, [35 Atl. 333].) The

same principle was enunciated by the supreme court of this state in *Patterson v. Conlan*, 123 Cal. 453, [56 Pac. 105]. To the same effect may be instanced *Western Bank v. Tallman*, 15 Wis. 92; *Fry v. Bennett*, 28 N. Y. 324; *Heflin v. State*, 88 Ga. 151, [30 Am. St. Rep. 147, 14 S. E. 112]; 23 Cyc. 586.

Contestant demanded a trial by jury which the court refused to grant. Contestant here contends that he was legally and of right entitled to a jury or that a trial by jury was certainly discretionary, and the court abused its discretion in not according it to him. The right to a trial by jury secured by the constitution has no reference to or bearing upon proceedings in probate. "It has been held that the right of trial by jury is secured by the constitution only in cases in which it had previously existed, in the administration of justice according to the course of the common law. Probate matters belong to ecclesiastical jurisdiction, where a jury was not a right. Such a proceeding is not really an action at law as defined in the code." (*In re Moore*, 72 Cal. 335, [13 Pac. 880].) A contest of a will and proceedings to revoke its probate are special proceedings. (*Estate of Joseph*, 118 Cal. 660, [50 Pac. 768]; *Carpenter v. Jones*, 121 Cal. 362, [53 Pac. 842].) It follows, then, in the absence of a statute providing for trial by jury, probate proceedings have always been heard by the court without the intervention of a jury. Only in those probate proceedings where the statute expressly confers a right to a trial by jury does the right exist. (*Wills v. Lachnane*, 9 Bush, (Ky.) 550; *Moody v. Found*, 208 Ill. 78, [69 N. E. 831]; Page on Wills, sec. 331.

Considering briefly the origin and history of our present code sections, it will be found that in the Probate Act of 1851 (Stats. 1851, p. 450), sections 20 to 24 provided for a contest of a will before probate, and sections 30 to 34 for a contest after probate. It will be found, moreover, that no jury was allowed by that act in a contest, either before or after probate. In 1855 sections 20 to 24 of the act of 1851, treating of a contest before probate, were amended, making a jury in such cases allowable upon demand. (Stats. 1855, p. 132; *Pond v. Pond*, 10 Cal. 495.) In 1861 section 20 was again amended (Stats. 1861, p. 630) so as to require that the

demand for the jury should be filed at least three days before the date set for the trial in the probate court, and that the case should thereupon be immediately certified to the district court, which court alone under the existing practice had power to determine such controverted questions of fact. (*Pond v. Pond*, 10 Cal. 495.) In 1868 section 20 was once more amended, by providing that the jury trials in the contests therein contemplated should be heard and determined in the probate court instead of being certified for determination to the district court. (Stats. 1867-8, p. 628.) These were the only amendments to these sections 20 to 24 of the Practice Act up to the time when they were transferred to the Code of Civil Procedure and embodied substantially in sections 1312 to 1317 thereof.

Sections 30 to 33 of the Probate Act of 1851 relating to contests after probate remained unchanged until re-embodied and re-enacted in sections 1327 to 1330 of the Code of Civil Procedure. But in re-enacting these sections into the code provisions, this declaration was added: "In all cases of petitions to revoke the probate of a will, wherein the original probate was granted without a contest, on written demand of either party, filed three days prior to the hearing, a trial by jury must be had as in cases of the contest of an original petition to admit a will to probate." (Code Civ. Proc., sec. 1330.) So far as this review has gone, it establishes that by the Probate Act as amended in 1855, a jury trial was demandable only in the case of a contest before probate, and never in a case of a contest after probate, whether the will had been originally admitted to probate with or without a contest. When section 33 of the earlier Practice Act was re-enacted in section 1330 of the Code of Civil Procedure, for the first time the significant addition was made of the clause above quoted, and the manifest purpose of this clause was to allow a contestant after probate a trial by jury, if the original probate was had and granted without a contest. While in terms the section does not declare that the contestant shall not be entitled to a jury, if the original probate was had after contest, yet as such contestant was only entitled to a jury in probate matters where the statute accorded it, and as the statute in this instance accorded no right in any case to a trial by a jury of a contest instituted

after probate, it is natural to conclude that section 1330 operated to make an exception to the general rule denying a jury in a case of contest after probate, by awarding the right in the limited cases where the probate had been granted without previous contest. (*In re Robinson*, 106 Cal. 493, [39 Pac. 862].) And this, it may be said, was a very proper relaxation of the rule, it being considered by the legislature proper that a jury might once be had to pass upon disputed issues of fact, but that, in the interest of expedition and the speedy disposition and distribution of estates, it was inexpedient that when these contested matters had once been passed upon by a jury, or when a right to a jury had once been accorded, a right to a second trial by jury, with its incident and consequent delays, should be allowed. But appellant places reliance upon sections 1716 and 1717 of the Code of Civil Procedure. These code sections are substantially re-enactments of section 294 of the Probate Act of 1851 (p. 486) as amended in 1855 (Stats. 1855, p. 300), and again in 1861 (Stats. 1861, p. 653). They have received consideration from this court in *In re Moore*, 72 Cal. 335, [13 Pac. 880]. But no sound argument of a contestant's general right to a trial by jury after probate can be drawn from these sections. Their language is broad. Their provisions are designed to lay down a rule with respect to cases concerning which no provisions elsewhere are found. Being general, they come under the established canon of construction, that their language is controlled by the special provisions of the code sections touching the same subject-matter. (*Martin v. Election Commissioners*, 126 Cal. 404, [58 Pac. 932].) Moreover, the provision of section 1330 must be considered as the latest expression of the legislative will. It has been pointed out that it was a new provision, modifying the older sections of the Probate Act, and it is declared by section 5 of the Code of Civil Procedure that the provisions of this code, so far as they are substantially the same as existing statutes, must be considered as continuations thereof and not as new enactments. And, finally, upon this proposition it may be added, that section 4482 of the Political Code declares that if the provisions of any chapter conflict with or contravene the provisions of another chapter of the same title, the provisions of each chapter must prevail as to all matters and questions

arising out of the subject-matter of such chapter. Section 1330 of the Code of Civil Procedure is contained in article IV of chapter II, while sections 1716 and 1717 are contained in chapter XII. Chapter II deals with the probate of wills, and article IV of that chapter deals with contesting wills after probate, while chapter XII is devoted to the consideration of "orders, decrees, processes, minutes, records, trials and appeals in probate matters." It is apparent that when considering a case dealing with the probate of a will and with contesting wills after probate, which is the case here presented, the articles and chapters dealing specifically with these matters must prevail over the general provisions which may be deemed to have a bearing upon this subject-matter. It is thus concluded that contestant was not entitled as of right to a jury trial. And as to the second consideration which he advances, namely, that if the matter was one of discretion, it was an abuse of discretion in the court in this instance to refuse a jury trial, little need be said. It is the policy of the law to curtail dilatory proceedings in the settlement of estates. There had been a contest before probate, instituted by the brother of this contestant, and tried before a jury, resulting in a verdict sustaining the mental competency of the testatrix. The judgment which followed was sustained upon appeal. With all of these facts this present contestant was familiar. There had been a full opportunity given before probate to have a jury determination of any and all matters of legitimate contest, and it is the policy of the law that where such a contest has been had, subsequent contests should be expeditiously dealt with by the court itself. It was, therefore, not an abuse of discretion, but within the well-defined policy of the law to refuse a jury trial under the circumstances shown.

Complaint is made that the court refused to delay the proceedings by issuing an alias citation for Mrs. Ida J. Moody, an heir at law of the decedent, who, though a resident of California, was sojourning in Europe, and also upon certain other heirs at law, or successors in interest thereto. Mrs. Moody took nothing under the will, but would have taken as heir had probate of the will been revoked. Her financial interests were therefore with and not opposed to contestants. Section 1329 of the Code of Civil Procedure does not make a service

of citation upon all of the parties essential. They may be proper parties, but are not necessary parties. The code expressly provides that at the time appointed for showing cause, personal service of the citation having been made upon *any* persons named therein "the court must proceed to try the issues of fact joined in the same manner as in an original contest of a will." Personal service of the citation had been made upon the executor and a number of the legatees, and they had answered the petition for revocation and were ready for trial. Nothing would have been gained by the issuance of an alias citation except delay, and although some of the persons interested were not served, since contestant has failed in his petition for revocation it could not advantage him if they had been served. He has suffered no injury.

Miss Etta Warren was called as a witness for contestant. Her deposition had previously been taken, and with its contents contestant was unquestionably familiar. The objections to certain questions propounded to Miss Warren were sustained by the court. Generally speaking, these questions called for hearsay declarations, and were inadmissible upon that account. Certain others could have been admissible only upon the theory that the witness had given unexpected testimony hostile to the party who called her. In view of the fact that Miss Warren had previously testified fully by deposition, it cannot seriously be contended that the testimony which she gave, conforming to her deposition, was matter of surprise to the contestant who had placed her upon the stand. But, moreover, it is well settled that when a witness has failed to testify as expected, the deficiency cannot be made good by the offer in evidence of declarations made by that witness out of court. The exception being that above adverted to, where to the surprise of the party the witness has given affirmative hostile evidence, and the declarations are received only for the purpose of neutralizing the effect of this hostile testimony so unexpectedly given. (*People v. Jacobs*, 49 Cal. 384; *People v. Creeks*, 141 Cal. 529, [75 Pac. 101].) In each instance where it was contended that the evidence of Miss Warren was thus unexpected and hostile, offer was made by counsel for the executors of the will to strike out her testimony, and thus eliminate any possible necessity for the introduction of these asserted declarations. Counsel refused to accept the offer

and the court thereupon sustained the objection. The ruling of the court, for both the reasons above given, was proper. The same may be said of the rulings touching questions propounded to the witness Mrs. Mai Watson, but in addition to this the questions themselves were shown to be plainly inadmissible. Thus, Mrs. Watson was asked whether or not Miss Dolbeer had committed suicide in New York. Counsel for respondent objected and were permitted by the court to show that Mrs. Watson was in San Francisco when Miss Dolbeer met her death, and could only know from hearsay the circumstances of that death, whereupon the objection to the question was sustained. Mrs. Watson was further asked if she had not said to her sister that Miss Dolbeer had followed in the footsteps of her mother, meaning that she had committed suicide. This question was objected to upon the ground that it was hearsay. The objection was well taken and was properly sustained. The witness was further asked if she had not told her mother or sister that Miss Dolbeer had attempted to take her life by suicide when she was on an Alaskan trip. It was not shown that the witness was with her on the trip, and it was shown that the testimony, if elicited, would be hearsay, and the objection was therefore properly sustained. Objection was also sustained to evidence touching certain purported admissions of Miss Warren, tending to show that Miss Dolbeer was of insane mind at the time of her death and had committed suicide. For the reasons discussed in the *Estate of Dolbeer*, 149 Cal. 227, [86 Pac. 695], the rulings excluding these declarations were proper. On the former appeal it was held that these declarations were not receivable in evidence because they could not bind the other legatees, and the same rule holds whether the evidence was addressed to the mental unsoundness of the testatrix or to the question of undue influence. (*Eastis v. Montgomery*, 93 Ala. 293, [9 South. 311]; *Dale's Appeal*, 57 Conn. 127, [17 Atl. 757]; *Fothergill v. Fothergill*, 129 Iowa, 93, [105 N. W. 377]; *McConnell v. Wildes*, 153 Mass. 487, [26 N. E. 1114]; *Roberts v. Bidwell*, 136 Mich. 191, [98 N. W. 1000]; *Schierbaum v. Schemme*, 157 Mo. 1, [80 Am. St. Rep. 604, 57 S. W. 526]; *In re Campbell*, 67 App. Div. 418, [73 N. Y. Supp. 753]; *Clerk v. Morrison*, 25 Pa. St. 453; *Chaddick v. Haley*, 81 Tex. 617, [17 S. W. 233].)

There have thus been considered all of the objections presented by appellant embracing the alleged erroneous rulings of law, and, as has been seen, no one of them has any merit.

The court refused to grant a new trial sought upon the ground of newly discovered evidence. Passing over the objections of respondents to the consideration of these affidavits, because they were not served or filed within the time allowed by law, and considering them upon their merits, there is nothing therein contained which would have justified the court in granting a new trial, still less to demand a reversal of its order refusing a new trial. Certain of the affidavits go to alleged visits of Miss Warren and Miss Dolbeer to a fortune-teller known as Ismar. Some of these affidavits are of persons who saw one or two women supposed to be Miss Warren or Miss Dolbeer, or both, go to the fortune-telling rooms of Ismar. No one of these identifies them both. One of the affidavits declares that the affiant was introduced to Miss Warren. But again, upon the other hand, Miss Warren denies that she was ever at the rooms of Ismar, with or without Miss Dolbeer, and denies the introduction, and the affidavit of Ismar is to the same effect. It further appears that whatever may have been the merit or demerit of the Ismar matter, it was known to contestant and his attorney as early as September, 1904; moreover, that Miss Warren herself, upon the trial of the cause, was interrogated as to her dealings with Ismar. The whole question then is in dispute. It had no great significance, and there was a total lack of diligence established. A second matter relates to the affidavit of Dr. Fowler, a physician who attended Miss Dolbeer in New York just previous to her death. Dr. Fowler was dead when the motion for a new trial came on to be heard, and any disclosure in evidence by him of information acquired as a physician would have been in violation of subdivision 4 of section 1881 of the Code of Civil Procedure. The affidavit of Patrick L. Francis, a reporter upon a New York newspaper, simply related certain circumstances that he observed and statements that were made at the coroner's inquest. If admissible at all, the testimony would have been without pertinency or value. Motions for new trial upon the ground of newly discovered evidence are always subject to careful scrutiny by the court, and the decision rests in its

sound discretion. (*Spottiswood v. Weir*, 80 Cal. 448, [22 Pac. 289]; *Harralson v. Barrett*, 99 Cal. 607, [34 Pac. 342].) As has been said and shown, there was no abuse of discretion in denying the motion in this case.

For the foregoing reasons the order appealed from is affirmed.

Lorigan, J., and McFarland, J., concurred.

Hearing in Bank denied.

[S. F. No. 4585. Department Two.—May 28, 1908.]

V. A. TAPSCOTT, Appellant, v. MEXICAN COLORADO
RIVER LAND COMPANY et al., Respondents.

CORPORATION—AGREEMENT TO DIVIDE ENTIRE CAPITAL STOCK IS VOID.—

An agreement upon the part of a corporation to divide its whole capital stock amongst its stockholders, is directly violative of the prohibitions of section 309 of the Code of Civil Procedure, and is null and void. The capital stock referred to in that section is the actual property of the corporation contributed by the shareholders.

ID.—SALE OF ENTIRE PROPERTY—DIVISION OF PROCEEDS AMONG STOCKHOLDERS.—If a corporation, upon the sale of its entire property, divides the proceeds proportionately amongst some of its stockholders, the remedy of a stockholder who has not shared in the distribution is to compel the restoration of the funds thus illegally distributed. He cannot maintain an action against the corporation for a proportionate amount of such proceeds.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. M. C. Sloss, Judge.

The facts are stated in the opinion of the court.

Gillis & Tapscott, and Jackson Hatch, for Appellant.

J. A. Stephens, and Curtis Hillyer, for Respondents.

HENSHAW, J.—To plaintiff's complaint a general demurrer was sustained with leave to amend. Upon plaintiff's failure

to amend, judgment passed for defendants, and plaintiff prosecutes this appeal. The material averments of his complaint are as follows: That the Mexican Colorado River Land Company, a defendant herein, is a corporation organized and doing business under the laws of the state of California; that its capital stock is forty thousand shares of the par value of fifty cents and that plaintiff is a stockholder, owning about one fifth of the capital stock, and is also a director of the company; that the Mexican Colorado River Land Company (which for convenience will be designated the California corporation), owned lands in the republic of Mexico; that in June, 1902, it executed to Harrison Gray Otis a contract of lease with an option to purchase these lands. By assignment Otis's rights were transferred to a corporation known as the Colorado River Land Company, *Sociedad Anonima* (which for convenience will hereafter be called the Mexican corporation); that the Mexican corporation in due course tendered to the California corporation the purchase money for the lands as agreed upon in the original contract with Otis, amounting to \$271,359, and the California corporation in turn accepted the money and executed its deeds to the lands to the Mexican corporation. The complaint then further alleges: "That on the same day and as a part of the same contract" (between the California corporation and Otis) "the stockholders of said corporation, the Mexican Colorado River Land Company, entered into a contract with said Harrison Gray Otis in the words and figures following, to-wit: . . ." This stockholders' contract or agreement with Otis recited, that whereas Otis had leased the lands from the California corporation with the option and privilege of purchasing the same at a stated price, "Now, therefore, if said Otis, his heirs or assigns, should or shall exercise said privilege and buy said property and pay the purchase price as stipulated in said lease and contract, then and in such event we hereby severally agree and bind ourselves, our respective heirs and assigns, to indorse, turn over, and assign without cost and free from all charges and encumbrances, all of the shares of the capital stock of said corporation now belonging to us severally to wit:" (here follows the names of the stockholders with the number of shares respectively owned by them) "and we further covenant and promise that, in addition to

such transfer of stock, we will individually and collectively by resignation of old and election of new directors, turn over to said Otis, his heirs and assigns, all of the machinery and control of said corporation." This paper was signed by the stockholders (amongst them plaintiff), representing a great majority of the stock of the California corporation. The complaint then alleges that upon receipt of the \$271,359 from the Mexican corporation, and upon the execution of the deeds by the California corporation, certain of the members of the board of directors of the California corporation resigned and their places were filled with other directors chosen and serving in the interest of the Mexican corporation in fulfillment of that clause in the stockholders' agreement above quoted whereby "all of the machinery and control" of the California corporation upon the purchase of this land was to be turned over to the purchaser. Plaintiff then, upon information and belief, alleges, and this seems to be the gravamen of his action, that the California corporation, of which he is still apparently a director "has executed and carried out the terms of said contract with all of the holders of the stock of said corporation except this plaintiff, and has paid them their proportionate shares of said sum of \$271,359, and that the said stockholders have severally indorsed, turned over and assigned without cost and free from all charges and encumbrances their said shares of the capital stock of said corporation . . . but that plaintiff has never been requested, nor has any demand been made upon him to do so, nor has any tender been made to him of his proportionate share of the moneys hereinabove referred to based upon his stock and the amount thereof in said" California corporation. It is then averred that the California corporation has no property other than such money as it may have retained, derived from the sales of its Mexican lands as above set forth, and that the corporation contemplates the investment of its funds in other lands, and alleges that "it is the intention of said board of directors to take action in relation to said matter, and to authorize the investment of said funds in properties and enterprises which the president or secretary claim or may claim to have found, being situate in the republic of Mexico, and to thereby remove the said funds from their immediate possession and out of the state of California, and that

they intend, and will in fact, deprive the plaintiff of his proportionate share thereof." Plaintiff, for specific relief on these facts, asks an award to him of the sum of \$46,863.25, being his proportionate share of the amount for which the lands were sold. Ancillary to this, he asks that the corporation be restrained from disposing of the funds until this amount so due him be paid.

From even a cursory consideration of this pleading, it is apparent that no legal connection is shown between the California corporation's contract to convey the lands to Otis and the independent stockholders' agreement to make over their stock in the event of such purchase. Whatever may have been the wisdom or unwisdom, the reason or want of reason, which induced the making of this stockholders' agreement, and, notwithstanding the fact that the pleader for his purposes treats this stockholders' agreement as the agreement of the corporation, as when he pleads that the corporation "has executed and carried out the terms of said contract with all the holders of the stock of said corporation except this plaintiff," nevertheless, in law, it is nowhere made to appear that this stockholders' agreement was in any sense, manner, or form binding upon the corporation. Moreover, if by the most liberal construction of this pleading it could be held for the purposes of this demurrer, that this stockholders' agreement did bind the corporation in the sense for which plaintiff contends, then, it must unhesitatingly be said that as to the obligation sought to be cast upon the corporation, this agreement is null and void, because it amounts to an agreement upon the part of the corporation to divide its whole capital stock amongst its stockholders by a method not in conformity with, but in direct violation of, the law. Section 309 of the Civil Code of California, so far as pertinent to this consideration, declares as follows: "The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; . . . nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock, . . ." There may, however, be "a division and distribution of the capital stock of any corporation, which remains after the payment of all its debts, upon its dissolution, or the expiration of its term of existence." The capital stock thus referred to is the actual

property of the corporation contributed by the shareholders. (*Excelsior Water & Min. Co. v. Pierce*, 90 Cal. 131, [27 Pac. 44]; *Kohl v. Lilienthal*, 81 Cal. 378, [20 Pac. 401, 22 Pac. 689]; *Vercoutere v. Golden State L. Co.*, 116 Cal. 411, [48 Pac. 375]; *Schaake v. Eagle Can Co.*, 135 Cal. 473, [63 Pac. 1025, 67 Pac. 759].) It appearing that the California corporation has no property other than the money received from the sales of its Mexican lands, plaintiff's demand, in its essence is, that it shall divide its total capital stock and give him his proportion in violation of the provisions of the code section above quoted. The fact that he avers on information and belief that the corporation has done this as to certain of the stockholders affords no reason for his demand that it do so to him. The fact, if it be a fact, that the corporation has acted wrongfully in this matter as to certain of its stockholders is certainly no reason for asking equity that it should decree that the corporation should do another illegal act for plaintiff's benefit. Plaintiff's recourse is to compel the restoration of the funds which he alleges were thus illegally distributed.

No weight attaches to the allegation in the complaint that the California corporation proposes to reinvest these moneys in other Mexican lands. The purposes of the organization of the corporation are not in the complaint set forth. All that can be legitimately derived from the complaint is that the investment in, transfer, and sales of such lands was one of the very purposes of its organization.

For these reasons the order sustaining the demurrer was correct and the judgment appealed from is affirmed.

Lorigan, J., and McFarland, J., concurred.

Hearing in Bank denied.

[S. F. No. 4705. Department Two.—May 28, 1908.]

A. BECKER, Appellant, v. IDA SCHMIDLIN, Respondent.

SLANDER—FILING UNDERTAKING.—JURISDICTION.—FILING UNDERTAKING AFTER COMMENCEMENT OF ACTION.—The jurisdiction of the court in an action for slander does not depend upon whether a sufficient undertaking is or is not filed at the time the action is commenced. It has such jurisdiction even when no undertaking at all is filed, and may permit one to be filed subsequent to the commencement of the action, and may permit a new undertaking to be filed in lieu of a defective one.

ID.—UNDERTAKING FOR SOLE BENEFIT OF DEFENDANT—DISCRETION IN PERMITTING FILING OF NEW UNDERTAKING.—The undertaking provided by the statute to be given at the time an action for slander is commenced runs in terms in favor of the defendant, and is intended to secure him in the costs and charges of the action which may ultimately be awarded him. The provision being for his sole benefit, the discretion vested in the court of permitting the plaintiff to file a new undertaking which will afford the defendant all the protection the law intends, should be exercised to effect that end. Especially should this permission be granted, when the plaintiff in good faith has originally endeavored to comply with the statute by filing an undertaking when the suit was commenced, and when a motion to dismiss was made for insufficiency of the undertaking filed, then offered, and was ready and able to file a new and sufficient undertaking. The fact that no new bond was then actually presented to the court is immaterial.

APPEAL from a judgment of the Superior Court of Santa Clara County. A. L. Rhodes, Judge.

The facts are stated in the opinion of the court.

Will M. Beggs, for Appellant.

E. E. Cothran, for Respondent.

LORIGAN, J.—This is an appeal from a judgment and order dismissing an action. The suit was brought to recover damages for slander, the complaint setting forth several causes of action, and it being alleged that the slanderous words were uttered by defendant, of and concerning the plaintiff at various dates between the first day of December, 1904, and the first day of February, 1905. The complaint was filed

October 16, 1905, and was accompanied by an undertaking in the sum of five hundred dollars, filed on the same day, in favor of defendant as provided by statute. (Stats. 1871, sec. 1, p. 533.)

Upon January 26, 1906, upon notice of defendant excepting to the sureties on the undertaking filed and objecting to the undertaking itself and the manner of its execution and requiring that the sureties justify, that matter came up for disposition before the department of the superior court in which the action was pending. At the hearing counsel for defendant waived objection to the sufficiency of the sureties themselves, but objected that they had never executed any undertaking in the action. From the showing made it appeared that the undertaking in question had been executed by the sureties on October 9, 1905, for the purpose of being used in another action for slander between the same parties which was then pending in another department of the superior court of Santa Clara County. In that action an undertaking had been given which had been objected to and it was intended to file the undertaking now under consideration in place thereof. The undertaking, however, was not used, the motion to permit it to be filed being denied and that action dismissed. Thereafter, the attorney for plaintiff, who was likewise a notary public before whom the sureties had verified the undertaking in question, being about to commence substantially the same action in another department of the superior court, saw the sureties, who consented that the undertaking they had signed might be used in this other contemplated suit. The notary thereupon changed the dates of the undertaking and of the verification from the ninth to the eleventh day of October, 1905, and as so changed, filed it with the complaint in this present action.

These facts appearing, counsel for defendant immediately moved that the action be dismissed upon the ground that no undertaking had been filed as required by the statute. The matter of the sufficiency of the undertaking was thereupon submitted to the court, and the judge thereof stated that he was satisfied that the undertaking was insufficient. Thereupon, counsel for plaintiff moved for leave to file a new undertaking—no new undertaking being then presented—to which offer objection was made by counsel for defendant and

the matter was submitted to the court on briefs of the respective parties to be filed. Thereafter, on February 9, 1906, the motion of plaintiff for leave to file a new undertaking was denied, and the motion of defendant that the action be dismissed was sustained and an order and judgment entered dismissing it. Exception was taken by plaintiff to the order denying the motion for leave to file a new undertaking and to the order dismissing the action, and under these exceptions the ruling and order of the court below are here for review.

It is insisted by the appellant that under the circumstances disclosed by the record it was an abuse of discretion on the part of the trial court to deny him permission to file a new undertaking, and to dismiss the action, and we are inclined to that view.

The jurisdiction of the court in an action for slander does not depend upon whether a sufficient undertaking is or is not filed at the time the suit is commenced. It has such jurisdiction even when no undertaking at all is filed, and may permit one to be filed subsequent to the commencement of the action, and, of course, may permit a new undertaking to be filed in lieu of a defective one. (*Dixon v. Allen*, 69 Cal. 527, [11 Pac. 179]; *Stinson v. Carpenter*, 78 Cal. 571, [21 Pac. 304]; *Smith v. McDermott*, 93 Cal. 421, [29 Pac. 34].)

It is true that a plaintiff neglecting to file a sufficient undertaking when suit is commenced incurs the danger of having his action dismissed upon the motion of the defendant for such failure, but when such motion is made and is well taken, the court may, nevertheless, in the exercise of a sound discretion, having jurisdiction of the action, permit the plaintiff to file a new and sufficient undertaking. The undertaking provided by the statute to be given runs in terms in favor of a defendant, and is intended to secure him in the costs and charges of the action which may ultimately be awarded him. The provision is for his sole benefit and this being true, the discretion vested in the court of permitting plaintiff to file a new undertaking which will afford a defendant all the protection the law intends should be exercised to effect that end. So exercised, it will permit the cause to be tried on its merits, which the law favors, instead of preventing it, which it discountenances. Especially should this permission

be granted where it appears that a party in good faith has originally endeavored to comply with the statute by filing an undertaking when the suit is commenced. This the plaintiff here did. We do not discuss the matter of the legal sufficiency of the undertaking which was filed, because that point is not involved on this appeal. But assuming that it was insufficient—or void as the trial court found—because executed to be used in another action, still the circumstances under which it was used in the present action, which disclose that it was with the express consent of the sureties who were admittedly financially responsible, indicated that counsel for plaintiff was, at least, acting in good faith under a belief that the undertaking was valid when he filed it. It further appeared at the hearing that the sureties on the undertaking were present in court offering to justify. One of them, the only one who testified, offered then to go on the undertaking, and it is to be inferred that the other who had consented to be bound before the undertaking was filed and was present in court to justify, would have been equally willing, and, hence, if plaintiff's application had been granted, it would have taken but a short time to have prepared a sufficient undertaking and filed it then and there.

Aside from the fact, however, that the plaintiff was ready, able, and willing to then furnish a good and sufficient undertaking, it further appears that when the court ultimately refused to permit him to do so, and dismissed the action, the statute of limitations had run against plaintiff's cause of action, and he was prevented from commencing a new suit. The result of the action of the court was, therefore, to defeat the assertion of any meritorious claim for damages which plaintiff might have had against the defendant.

Under these circumstances we are satisfied that the application of plaintiff should have been granted, as was done in the case of *Dixon v. Allen*, 69 Cal. 527, [11 Pac. 179], where no undertaking had been filed at all, and on motion to dismiss the trial court properly allowed plaintiff to file one. And this court, in *Smith v. McDermott*, 93 Cal. 421, [29 Pac. 34], makes no question but that it should be done, where it says: "When the motion to dismiss was made and the plaintiff's attention was directly called to the matter (the insufficiency of the undertaking) she might have asked, and

doubtless would have obtained leave, to file an undertaking in due form as required by the statute."

There is nothing in the suggestion in respondent's brief that no new bond was presented to the court. Counsel for respondent offered to give one at the hearing, and, as we have said, the record discloses with almost a certainty that he was prepared then and there to do so. This was the very offer that was submitted on briefs and taken under advisement by the court, and it was not fatal to the claim of plaintiff of abuse of discretion by the court in denying it, that he did not actually tender an executed undertaking, when the court had under consideration the very matter of whether it would permit him to do so or not.

The judgment of the trial court is reversed, with directions to set aside the order of dismissal, and grant leave to the plaintiff to file an undertaking as required by the statute within a limited time.

Henshaw, J., and McFarland, J., concurred.

[S. F. No. 4641. Department Two.—May 28, 1908.]

JOSEPH M. DORCY, Appellant, v. MARIA BRODIS et al.,
Respondents.

NEW TRIAL—MOTION FOR MUST BE PROSECUTED DILIGENTLY.—A motion for a new trial is an independent proceeding in an action, in which the burden of acting is at all times upon the moving party, and it devolves upon him to proceed with diligence.

ID.—DISMISSAL FOR WANT OF DILIGENCE—DISCRETION.—A motion for a new trial may be dismissed for lack of due diligence in its prosecution, and the determination of the question as to whether there has been due diligence is one necessarily largely within the discretion of the trial court.

ID.—DELAY OF FOUR MONTHS IN SETTLING STATEMENT.—An inexcusable delay for almost four months in having a proposed statement on motion for a new trial heard and settled, is sufficient to warrant the trial court in finding that the moving party had not proceeded with due diligence, and justifies it in dismissing the motion.

ID.—FIXING DATE FOR SETTLEMENT OF STATEMENT.—The right of the prevailing party to have a motion for a new trial dismissed on
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account of the failure of the moving party to prosecute it diligently by having the statement settled could not be affected by the action of the court of its own motion or by the *ex parte* application of the moving party in fixing a day for the settlement.

APPEAL from an order of the Superior Court of Santa Cruz County dismissing a motion for a new trial. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

William A. Bowden, Charles M. Cassin, and James P. Sex, for Appellant.

James Alva Watt, for Respondents.

LORIGAN, J.—This is an appeal by plaintiff from an order dismissing his motion for a new trial.

The action was brought to quiet title to a tract of land in the county of Santa Cruz, in which judgment was rendered in favor of the defendants and against plaintiff. In due time and on May 18, 1905, plaintiff gave notice of intention to move for a new trial. Thereafter, on June 1, 1905, his counsel served on the attorney for defendants what purported to be a statement in support of said motion. On the thirty-first day of August thereafter, defendants prepared and served upon plaintiff their proposed amendments to such statement, subject to objections interposed and saved therein against the settlement of said statement on the ground that it was a mere skeleton statement, inaccurate and incorrect in every material particular, and that it was sham and not prepared or proposed in good faith. Thereafter, defendants gave notice of a motion to dismiss plaintiff's motion for a new trial on the same grounds urged against the settlement of the statement. This motion came on to be heard on September 9, 1905, and was by the court denied. Subsequently, and on December 29, 1905, defendants again gave notice of motion to dismiss said motion for a new trial, to be heard January 2, 1906, and among other grounds, upon the ground that the plaintiff had failed to prosecute his motion for a new trial with due diligence. The matter was presented and heard upon affidavits of the

respective attorneys in the action and the proceedings in the cause, and after due consideration was granted by the trial court, and plaintiff appeals.

It is insisted by the appellant that the court abused its discretion in granting the motion to dismiss.

In *Galbraith v. Lowe*, 142 Cal. 296, [75 Pac. 831], it is said: "A motion for a new trial is an independent proceeding in an action, in which the burden of acting is at all times upon the moving party. . . . It is the moving party who is the actor in the proceeding and who is seeking the settlement of the bill of exceptions and the determination of the motion for a new trial, and it devolves upon him to proceed with diligence. . . . The power to dismiss a motion for a new trial on the ground that the same has not been prosecuted with due diligence being conceded, the determination of the question as to whether there has been due diligence is one necessarily largely within the discretion of the trial court." (See, also, *Boggs v. Clark*, 37 Cal. 236; *Hopkins v. Western Pacific R. R. Co.*, 44 Cal. 389.) Applying this rule, it appears that from the thirty-first day of August, 1905, when the amendments were served, up to the hearing of the last motion to dismiss which was granted, plaintiff had taken no action whatever to have the proposed statement heard and settled. It is true that in his affidavit counsel for plaintiff endeavors to excuse his delay upon the ground that he understood that there was an arrangement between himself and the attorney for defendants that the statement would be taken up at any time agreeable to both parties. But counsel for defendants, in a counter affidavit, deny any such agreement or understanding, and these conflicting affidavits were the only evidence upon that subject. The court was of the opinion that in this conflict there was no sufficient showing on the part of counsel for plaintiff excusing his delay in procuring the settlement of the statement and so stated in disposing of the motion. The court could then only look, as it did, to the records in the case which did not show any stipulations between the parties extending time or any orders of court having that effect. From the record it simply appeared that practically for four months after the statement and amendments should have been presented for settlement nothing was done by counsel for plaintiff to effect that end. The law required plaintiff as the moving

party to proceed with diligence at the peril of having his motion for a new trial dismissed and an inexcusable inactivity for almost four months was sufficient to warrant the trial court in finding that the plaintiff had not proceeded with due diligence. Hence, there was no abuse of discretion on the part of the court in dismissing the motion for a new trial for that reason.

It is claimed by plaintiff that at the time the notice was given of the motion to dismiss, the court had already fixed the 3d of January, 1906, as the date for the settling of the statement. While it appears from the affidavit of plaintiff that the court had fixed that date for the settlement, there is nothing to show that the order fixing it was made prior to the filing of the notice of the motion to dismiss the motion for a new trial, or that that time was fixed by consent of the parties. In the absence of such showing no presumption is to be indulged that the order fixing the date of the settlement was made prior to the filing of the notice of motion to dismiss. All that appears is that there was a day fixed by the court for the hearing of the statement, which was subsequent to the filing of the notice of motion to dismiss and the date fixed for hearing such motion. The right of the defendants to have the motion for a new trial dismissed on account of failure to prosecute it diligently by having the statement settled could not be affected by the action of the court of its own volition or by the *ex parte* application of the attorney for the plaintiff in fixing a day for the settlement. If there was inexcusable delay on the part of plaintiff the defendants had a right to move to dismiss for that reason, and the action of the court in fixing a day for settlement could in no respect interfere with that right.

The order appealed from is affirmed.

Henshaw, J., and McFarland, J., concurred.

Hearing in Bank denied.

[S. F. No. 4613. Department Two.—May 29, 1908.]

CHARLES T. CASSIN, Respondent, v. D. W. COLE,
Appellant.

WAY OF NECESSITY—CESSATION OF NECESSITY—DEDICATION OF ROAD.—

A way of necessity over the lands of a grantor arises from necessity alone and continues only while the necessity exists. After the grantor has dedicated over his lands a road for the use of the grantees, the latter's right to a way of necessity ceases, notwithstanding the road so established is less convenient than the way previously used.

TRESPASS TO LAND—DAMAGES—EVIDENCE.—In an action to recover damages for trespass to land evidence of the plaintiff to the effect that by reason of the trespass he had lost the growth of trees for two years "and was damaged in the sum of \$100," is sufficient to sustain a judgment for the plaintiff in that amount. If the defendant questioned the soundness of the plaintiff's estimate of damages, he should have inquired upon cross-examination and shown the reasons and the foundation upon which the estimate rested.

APPEAL from a judgment of the Superior Court of San Benito County and from an order refusing a new trial. M. T. Dooling, Judge.

The facts are stated in the opinion of the court.

H. C. Wyckoff, for Appellant.

C. M. Cassin, and Briggs & Hudner, for Respondent.

HENSHAW, J.—This action was for an injunction to restrain defendant from alleged repeated acts of trespass upon plaintiff's land in driving and traveling across it. Damages were sought in the sum of one hundred dollars. Defendant asserted an easement and right of way across plaintiff's land, and the existence of this right of way is the principal matter in controversy between the parties. After trial the court gave judgment for plaintiff as prayed for. The findings, which are supported by the evidence, though as to certain matters the evidence is conflicting, were to the effect that the defendant purchased a farm of 325 acres from Jesse D. Carr, who was the owner of a very large tract of land,

at that time undivided. Defendant's land did not touch upon any public street. He explained this to Carr, who replied that he would give defendant an outlet. Defendant wanted Carr to include a right of way for a road in the deed, but Carr declined to do so, stating that he could not tell where the road designed for the land bought by appellant would be until the whole tract had been surveyed and subdivided. He told appellant, however, that he proposed to make a way out for everybody and that every piece of land he sold should have a way to a road. Meanwhile he gave appellant permission to travel over his land until it was subdivided. Appellant was to travel where anybody was traveling on the ranch, so long as he did not interfere with the farming business. At no time did Carr tell appellant that he should have a right of way over any particular part of the land, but only that he should travel as other people traveled over the ranch. Entering the ranch by a gate, people traveled about as they chose, sometimes following one track and sometimes another. This they did, without express permission, but nobody objected so long as the gates were closed. Appellant in traveling across the lands of Carr traversed lands subsequently purchased by this plaintiff. No objection was made to appellant's doing this while the land was used for farming purposes. In fact the respondent informed appellant that he could continue using the road until respondent devoted the land to other purposes than farming. Some years after, Carr's land was finally subdivided and a road laid out through the ranch along appellant's south line, which would give him access to the county road without traversing the land of any other person. But appellant continued to travel by the old route under this license from respondent, as it was more direct and convenient for his purposes, and some little labor and expense would be necessary in making the road dedicated by Carr suitable for travel. So things continued, appellant still driving with the respondent's permission over the latter's land until respondent desired to plant the land to orchard trees, when he requested appellant to cease traveling over it. Appellant refused to do so, and here asserts his right to the old road by prescription and as a road of necessity. The findings of the court, supported by the evidence, are destructive of the

appellant's contention of prescriptive right. It is made to appear that the road which he traveled was used permissively until such time as his grantor should delimit and dedicate a permanent road for his purposes. After this was done appellant's continued use of the old road was still, as found by the court, under revocable permission given by respondent.

The facts so found render unnecessary any consideration of the law governing rights of way by prescription, and as little force can be accorded appellant's contention that he acquired a perpetual right over the old way by necessity. It was shown that he was allowed to travel over any part of the ranch until such time as a specific road was described and dedicated to his use. A way of necessity arises from necessity alone and continues only while the necessity exists. Unquestionably appellant had a way of necessity across his grantor's ranch until a road was dedicated to his use, but when that was done his right to a way of necessity ceased, and it matters not that the old road was more convenient for his purposes. When it ceased to be indispensable the right ceased. (*Kripp v. Curtis*, 71 Cal. 65, [11 Pac. 879]; *Carey v. Rae*, 58 Cal. 163; *Blum v. Weston*, 102 Cal. 369, [41 Am. St. Rep. 188, 36 Pac. 778].)

Upon the question of damages plaintiff testified as follows: "I did not put in the orchard on account of his traveling through there. I did not want an orchard where a man was going through it. I lost the growth of the trees for two years and was damaged in the sum of one hundred dollars. I don't know whether it is easy to get at damages of this kind." Upon this appellant contends that the damages awarded were because of the loss of the growth of the trees for two years, and insists that damages upon this account are not allowable in an action such as this. (*Dorsey v. Manlove*, 14 Cal. 553; *Chicago v. Huenerbein*, 85 Ill. 594, [28 Am. Rep. 626].) If this were the only legitimate and possible construction which could be put upon plaintiff's evidence above quoted, much force would attach to appellant's contention. But it is equally open to the construction that plaintiff meant that he lost the growth of the trees for two years, and in addition was damaged in the sum of one hundred dollars. So construed, it was the duty of appellant's counsel, if they questioned the soundness of this estimate of damages, to have

inquired upon the cross-examination and shown the reasons and the foundation upon which the estimate rested. (*Razzo v. Varni*, 81 Cal. 289, [22 Pac. 848].) Failing to do this, the evidence of plaintiff is sufficient to support the judgment rendered.

The alleged errors of the court in ruling upon the evidence and in overruling appellant's demurrer to plaintiff's second amended complaint do not call for special consideration. The evidence which the court admitted was pertinent and proper, and its decision overruling the demurrer was sound. The complaint was in the usual and sufficient form for an injunction to prevent future trespasses and for the award of damages for trespasses already committed. (*Hughes v. Dunlap*, 91 Cal. 390, [27 Pac. 642]; *Jacob v. Lorenz*, 98 Cal. 332, [33 Pac. 119].)

The judgment and order appealed from are affirmed.

Lorigan, J., and McFarland, J., concurred.

A petition for a hearing in Bank having been filed the following opinion in Bank was rendered thereon on June 25, 1908.

THE COURT.—Rehearing denied. The judgment is not susceptible of the construction sought to be placed upon it by appellant. It does not limit his right to travel on Aromitas Avenue to one direction only.

[S. F. No. 4667. Department Two.—May 29, 1908.]

HOME AND FARM COMPANY OF CALIFORNIA,
Respondent, v. M. T. FREITAS, Appellant.

REFORMATION OF DEED—MUTUALITY OF MISTAKE AS TO DESCRIPTION OF LAND—SUFFICIENCY OF PROOF—CONFLICT.—In an action to reform a deed for mutuality of mistake as to the description of the land, caused by the mistake of a draughtsman carried into the deed, giving the defendant about sixteen acres more land than was contemplated by the parties, although the proof of the mistake and its mutuality must be clear and convincing, yet a mere conflict in

the evidence, does not necessitate a denial of the relief, but the court's finding of the mistake and its mutuality, upon conflicting evidence, if well supported by sufficient evidence, will not be disturbed, notwithstanding the denial of the mistake by the defendant, who is seeking to hold more than he is justly entitled to.

ID.—ERRONEOUS DESCRIPTION BY METES AND BOUNDS—EXCESS OF ACREAGE—SPECIFIC AND DIFFERENT VALUATIONS.—Though a description of land in a deed by metes and bounds conveys the legal title to all the land included therein, yet a court of equity is not precluded from reforming the deed so as to express the true intent of the parties, where there is an excess of acreage, and it is clearly shown, throughout, that the tracts and parcels of the land were not valued as a whole, but were specifically and differently valued in acreage valuation in accordance with the quality and location of the land.

ID.—SEGREGATION OF LAND ERRONEOUSLY CONVEYED — PLEADING AND PROOF.—Where the specific tract of land decreed to have been erroneously conveyed is supported by the complaint showing just what the error in the deed was, and the exact description of the land erroneously conveyed, and by the evidence clearly showing the specific acreage and its *situs*, as pleaded, the court properly decreed the reformation of the deed in relation thereto.

ID.—DEMAND FOR CORRECTION OF DEED BEFORE SUIT.—A sufficient demand for the correction of the deed before suit, is shown by a request for a correction deed, reconveying the property, made by the engineer and surveyor of the plaintiff upon the defendant, and its refusal by him, upon the ground that no mistake had been made.

APPEAL from a judgment of the Superior Court of Marin County and from an order denying a new trial. Thomas J. Lennon, Judge.

The facts are stated in the opinion of the court.

James W. Cochrane, and James C. Sims, for Appellant.

William Singer, Jr., and Guy Sharp, for Respondent.

HENSHAW, J.—This action was brought to correct and reform a deed to certain lands situate in the county of Marin, upon the ground of a mutual mistake of the parties, whereby some sixteen acres of land more than contemplated by the parties were conveyed by erroneous description. Judgment passed for plaintiff and from that judgment and from an order denying his motion for a new trial defendant appeals.

His principal contention upon the appeal is that the mistake was not mutual, that whatever may have been in the mind of the grantor, as to himself, the grantee, he received only such land as he understood he was to receive.

Plaintiff most satisfactorily established the following facts, many of them from the mouth of defendant himself, others undisputed by him: Defendant had negotiated with Mr. Chatfield, a real estate agent, for the purchase of certain of plaintiff's lands. The negotiations resulted in an agreement for the purchase and sale of the following lands, at the prices given:

| | |
|--|------------|
| 140.25 acres, lot 11, division B, at \$54 per acre.... | \$7,573.50 |
| 30 acres, hill land, division B, at \$12 per acre..... | 360.00 |
| 60 acres, lot 12, division C, at \$12 per acre..... | 720.00 |
| Total | \$8,653.50 |

After this agreement had been entered into it was discovered by Mr. Chatfield that there had been sold to other persons part of the thirty-acre tract of hill land in division B, which reduced the acreage of that tract about half. Then, in order to make up the 171 acres in division B which Mr. Freitas desired, the surveyor was instructed to take an equivalent quantity of adjoining lands in division B. This he did, but in so doing it was necessary to substitute for the fifteen or sixteen acres of hill land at \$12 per acre an equal amount of level reclaimed land valued at \$54 per acre. Plaintiff then caused its deed to be prepared upon March 31st, conveying to defendant:

| | |
|---------------------------------------|------------|
| 156.71 acres at \$54, division B..... | \$8,462.34 |
| 14.29 acres at \$12, division B..... | 171.48 |
| 60.00 acres at \$12, division C..... | 720.00 |
| Total | \$9,353.82 |

While under the deed thus tendered defendant Freitas was to have received the exact amount of acreage provided for by his contract with Mr. Chatfield, the cost of the land, by reason of the substitution of fifteen acres of reclaimed land for the hill land was \$700.32 more than the purchase price originally agreed upon. Upon this Mr. Freitas refused to accept the deed and pay the money, demanding title to the

land for which he had originally contracted. Plaintiff explained its inability to make conveyance because of the sale of fifteen acres of the hill land, and offered to restore the deposit paid by Freitas, which he refused to accept. Eventually, and at Mr. Freitas's demand, the matter was adjusted. In Mr. Freitas's own language, "I got to thinking the matter over, and I says, 'You got fifty-five acres of land there adjoining lot 12, division C; if you would sell me that land for twelve dollars per acre, just as I paid for the sixty acres adjoining, I would take that extra land of that survey and pay you the price, and I don't want any more difficulty about the surveys.' . . . Mr. Perkins requested me to wait a few minutes; that he would communicate with Mr. Mills again. I did so, and his reply was that Mr. Mills refused to sign such an agreement, and then I told Mr. Sims I wanted him to file a complaint compelling those people to live up to their agreement. . . . The next day Mr. Sims telephoned me that he had a message from Mr. Mills stating that rather than go to law he would let me have this land as it was surveyed off by Mr. Lepoids, and the sixty acres, and fifty-five acres of lots 12 and 13, division C, for the lump sum of ten thousand and thirteen dollars and some odd cents, according to the proposition which I made to Mr. Perkins. He wanted to know if it was satisfactory to me. I said, 'Yes, go ahead and have deeds made to that effect.'" It thus appears from the defendant's testimony that he agreed to take the following land at the following prices:

| | |
|---|-----------------------|
| 156.71 acres, division B, at \$54 per acre..... | \$8,462.34 |
| 14.29 acres, division B, at \$12 per acre..... | 171.48 |
| 60.00 acres, division C, at \$12 per acre..... | 720.00 |
| 55.00 acres, division C, at \$12 per acre..... | 660.00 |
| <hr/> | |
| 286.00 | Total.....\$10,013.82 |

In accordance with this agreement a deed was prepared and executed by the Home and Farm Company to Freitas, which was accepted by him. In the map, however, which was used, and which was supposed accurately to follow the survey by Mr. Lepoids, plaintiff's engineer, a false line had been drawn, not in accordance with the surveyor's notes. The description in the deed followed the boundaries as shown upon

the map, and in so doing included some fifteen or sixteen acres more than were called for by the true survey—more than 286 acres actually purchased by defendant. This error in delineating the course, lines, and distances of the survey upon the map is clearly shown and established by a comparison between the field-notes and the map, and by the testimony of Mr. Gibbs who actually drew the map. The result was that in division B, of which division under his deed Freitas was to take 156.71 acres at \$54 an acre, and 14.29 acres at \$12 an acre, there was an excess over this amount of land of fifteen or sixteen acres. This is admitted by appellant. The location of the faulty line is shown also by the evidence, and thus is established the *situs* of the excess acreage. This error was soon discovered by plaintiff, and it prepared and presented to Mr. Freitas a deed for his execution, reconveying this excess land so by mistake conveyed to him. Mr. Lepoids, the engineer of plaintiff, saw Mr. Freitas and explained to him the mistake. He was referred by Mr. Freitas to Mr. Sims, his attorney. Mr. Lepoids with his map and deed went to Mr. Sims, explained the matter and offered the correction deed. The defendant's answer does not deny that he refused to correct the mistake, but expressly alleges that no mistake was made.

That the statement above given establishes a clear case of mistake is at once apparent. The only question upon this point is whether there was such mutuality in the mistake as to authorize a court of equity to correct it. But in this connection it is to be remembered, as was said by this court in *Sullivan v. Moorhead*, 99 Cal. 157, [33 Pac. 796], that while to justify a court of equity in decreeing the reformation of a written instrument on the ground of mistake, the proof of the mistake must be clear, convincing and satisfactory to the court, "yet a mere conflict of testimony as to the mistake does not necessitate a denial of the relief (*Hutchinson v. Ainsworth*, 73 Cal. 452, [2 Am. St. Rep. 823, 15 Pac. 82]; *Wilson v. Moriarity*, 88 Cal. 211, [26 Pac. 85]), and the decision of the trial court upon such conflict of evidence is conclusive upon this court." The most that can be said for Freitas's position, which is to the effect that no mistake was made and that he "paid the balance of that \$700.32 for the extra acreage they claimed was on lot 11, division B," is that

it is against the weight of evidence. Plaintiff was not claiming extra acreage in division B. It was asking for the substitution of an equivalent acreage of greater value. It is a mere coincidence that this substituted acreage amounted to about fifteen acres, while the deed actually made conveyed about fifteen acres excess. It is shown throughout that the tracts, pieces, and parcels of land were not valued as a whole, but were specifically and differently valued in acreage valuations in accordance with the quality and location of the land. Mr. Freitas's own testimony is that it was agreed that he was to have the land "as it was surveyed off by Mr. Lepoids." Mr. Lepoids's survey was correct. The error that occurred originated in the draughtsman's mistake which was carried into the deed. As shown by the transaction, Mr. Freitas had never sought for nor contracted for more than 171 acres in division B, and yet he is seeking to hold sixteen acres more than it was ever in contemplation that he should purchase. In emphasizing the fact that the defendant obtained more than the exact acreage which he had contracted to purchase, we are not unmindful of the principle that a description of land in a deed by metes and bounds conveys the legal title to all of the land embraced within such boundaries, regardless of the acreage which may be specified in the deed, but nevertheless it is true that such a description does not preclude a court of equity from reforming such a deed so as to express the true intent of the parties. (20 Am. & Eng. Ency. of Law, 2d ed., 826; *Kocher v. Hayford*, 59 Cal. 316; *Stevens v. Holman*, 112 Cal. 345, [53 Am. St. Rep. 216, 44 Pac. 670]; *Capelli v. Dondcro*, 123 Cal. 324, [55 Pac. 1057].) The court's finding of the mistake and of its mutuality is well supported and will not be disturbed. Where a defendant in such an action is seeking to hold more than he is justly entitled to, and where the very issue in the action is the mutuality of the mistake, the trial court is compelled to decide upon conflicting evidence, and if a mere denial of the defendant that he was mistaken is to suffice, it must result in every case that where such denial is made the plaintiff must fail of relief. Such, as has been above shown, however, is not the law.

As to the further propositions advanced by defendant—the one that a demand for reformation was necessary before

action commenced (*Black v. Stone*, 33 Ala. 327; *Brainerd v. Arnold*, 27 Conn. 617), it is sufficient to say, as pointed out above, that a request for a correction deed reconveying the property was made by the engineer and surveyor of plaintiff upon defendant, by defendant referred to his attorney, and by both refused, as appears by the answer, upon the ground that no mistake had been made. As to the final proposition advanced, that the court in reforming and correcting the deed erred in segregating the specific tract of land which it decreed had been erroneously conveyed, it is made apparent by the pleading just what the error in the deed was and the exact description of the land erroneously conveyed. These allegations of the complaint are abundantly supported by the evidence, so that the specific acreage and its *situs* were clearly shown. It was this acreage as to which the court decreed a reformation of the deed.

The judgment and order appealed from are, therefore, affirmed.

Lorigan, J., and McFarland, J., concurred.

[L. A. No. 1960. In Bank.—June 3, 1908.]

SUSIE G. COUTS, and JOHN COUTS, Respondents, v.
CAROLINA M. WINSTON, and JOHN B. WINSTON,
Appellants.

ACTION TO REDEEM FROM DEED INTENDED AS MORTGAGE—PAROL EVIDENCE—SUFFICIENCY OF PROOF—CONFLICT—REVIEW UPON APPEAL.—

In an action to redeem from a deed absolute upon its face alleged to have been intended as a mortgage, parol evidence is admissible to prove such intention. Although the rule is that such evidence must be clear and convincing to change the character of the deed, yet, whether the evidence offered is clear and convincing, is a question for the trial court; and where the plaintiffs' evidence was sufficiently clear and convincing to satisfy that court, notwithstanding conflicting evidence to the contrary by numerous unimpeached witnesses for the defendants, its decision in favor of the plaintiffs is not subject to review upon appeal.

ID.—MORTGAGE INDEBTEDNESS—APPLICATION FOR LOAN—REQUEST ACCORDED TO—IMPLIED PROMISE.—An indebtedness is essential to a mort-

gage, and where it appears that application had been made for a loan from defendants by the plaintiffs, and the defendants acceded to the request, and the deed was intended to secure the same, it cannot be urged that there was no direct evidence of a promise by plaintiffs to repay the loan, as such promise is implied in fact as well as in law.

ID.—LEASE—RENTAL EQUIVALENT TO INTEREST—LOAN FROM SISTER TO PAY MORTGAGE AND OTHER DEBTS—PROMISE OF QUITCLAIM.—Where the loan was from plaintiff's sister to pay a mortgage on home-property and other debts, and the transaction was in the form of a deed, and a lease for a year at a rental equivalent to interest, and a promise to reconvey if the principal loan was repaid within the year, and a promise of a quitclaim by plaintiffs, if unable to pay, the intention being to avoid foreclosure proceedings, the promise to quitclaim shows an intention of plaintiffs to retain an equity which would not be lost by the mere failure to repay the loan within the time specified in the lease; and the court properly held that the transaction was in effect a mortgage to secure the loan, and that plaintiffs were entitled to redeem therefrom after the expiration of the lease.

APPEAL from a judgment of the Superior Court of San Diego County and from an order denying a new trial. N. H. Conklin, Judge.

The facts are stated in the opinion of the court.

Daney & Lewis, Bicknell, Gibson, Trask, Dunn & Crutcher, and Edward E. Bacon, for Appellants.

There being no debt, and no promise to repay the money, there was no mortgage. (*Henley v. Hotaling*, 41 Cal. 28; *Ahern v. McCarthy*, 107 Cal. 382, 386, 40 Pac. 482; 3 Pomeroy's Equity Jurisprudence, p. 1196.) The evidence falls short of the proof which the law requires, and the appellate court is bound by the rule. (*Sheehan v. Sullivan*, 126 Cal. 189, 194, 58 Pac. 543, and cases cited.)

Stearns & Sweet, for Respondents.

The findings must be sustained, if there is any evidence for plaintiffs to support them regardless of defendants' testimony. (*Heinlen v. Heilbron*, 97 Cal. 101, 31 Pac. 838; *Chicago Bridge Co. v. Sacramento Transp. Co.*, 123 Cal. 178, 55 Pac. 780;.

Fox v. Oakland Consolidated St. Ry. Co., 118 Cal. 58, 62 Am. St. Rep. 216, 50 Pac. 25; *Farmer v. Grose*, 42 Cal. 169.) The court was justified in finding the existence of a debt and security therefor without regard to the form of the transaction. (*Montgomery v. Spect*, 55 Cal. 352; *Sears v. Dixon*, 33 Cal. 326; *Hickox v. Lowe*, 10 Cal. 197; *Farmer v. Grose*, 42 Cal. 169; *Husheon v. Husheon*, 71 Cal. 407, 12 Pac. 410; *Locke v. Moulton*, 96 Cal. 21, 30 Pac. 957; *Banta v. Wise*, 135 Cal. 277, 67 Pac. 129.)

SLOSS, J.—In 1902 the plaintiffs executed and delivered to the defendant Carolina M. Winston a deed of certain real property in San Diego County. This action was brought to have that deed declared a mortgage, and to redeem the land. The defendants answered, denying that the instrument was intended as a mortgage, and filed a cross-complaint praying judgment for possession of the premises. Upon a trial, the findings were in favor of the plaintiffs, and they had judgment granting them the right to redeem. Appeals are taken from the judgment and from an order denying the defendants' motion for a new trial.

The only contention made by appellants is that the evidence was insufficient to justify the finding of the court that the deed from plaintiffs to Carolina M. Winston was intended to be, and in fact was, a mortgage.

It is no doubt the law, as repeatedly declared in our decisions, that clear and convincing evidence is required to justify a court in finding that a deed which purports to convey the title to land in fee simple was intended to be a mortgage. "That a deed purporting on its face to convey the title absolutely may be shown by parol evidence to be something else—namely, a mortgage—is a striking exception to the general rule, and it has been universally held that the character of the instrument cannot thus be changed except upon clear and convincing evidence." (*Woods v. Jensen*, 130 Cal. 201, 203, [62 Pac. 473]; see, also, *Mahoney v. Bostwick*, 96 Cal. 53, [31 Am. St. Rep. 175, 30 Pac. 1020]; *Sherman v. Sandell*, 106 Cal. 373, [39 Pac. 797]; *Ahern v. McCarthy*, 107 Cal. 382, [40 Pac. 482]; *Sheehan v. Sullivan*, 126 Cal. 189, [58 Pac. 543]; *Emery v. Lowe*, 140 Cal. 379, [73 Pac. 981].) But whether or not the evidence offered to change

the ostensible character of the instrument is clear and convincing is a question for the trial court. (*Brison v. Brison*, 90 Cal. 323, 334, [27 Pac. 186]; *Mahoney v. Bostwick*, 96 Cal. 53, [31 Am. St. Rep. 175, 30 Pac. 1020].) In such cases, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review in this court. (*Sherman v. Sandell*, 106 Cal. 373, [39 Pac. 797].) If, therefore, the evidence offered by plaintiffs, taken by itself, was sufficiently "clear, satisfactory and convincing" to satisfy the trial court that the deed was in fact a mortgage, the finding made cannot be overthrown merely because numerous witnesses, whose character is not impeached, gave positive testimony to the contrary effect. As was said in *Wadleigh v. Phelps*, 149 Cal. 627, 637, [87 Pac. 93], the appellate court "will not disturb the finding of the trial court to the effect that the deed is a mortgage, where there is substantial evidence warranting a clear and satisfactory conviction to that effect. All questions as to preponderance and conflict of evidence are for the trial court."

Reading the record in the light of these rules, we cannot say that the finding declaring the deed in question to be a mortgage was without sufficient support in the evidence.

The land in controversy is a tract of 233 acres, the greater part of which is farming land. The plaintiff John F. Coutts had resided on the property for a number of years. The defendant Carolina M. Winston is his sister. In 1898, John F. Coutts and his wife, the co-plaintiff, executed a mortgage of the property to the German American Savings Bank to secure a loan of fifteen hundred dollars. In 1902 the bank commenced suit to foreclose its mortgage. Coutts testified that, while this suit was pending, he wrote to John B. Winston, the husband of his sister Carolina, asking him for help and offering to secure him with a deed if he would loan the money required to pay the mortgage. Winston replied in a letter in which he said, among other things, "If you care to accept, on the proposition to deed over the property as you suggested, I can offer you two thousand dollars." Coutts then went to Los Angeles, the home of the Winstons, to close the matter up. He told Mr. Winston, as he testifies, that "it was very nice of him to help me, if he was going to lend that money I would deed him the property, you know, that when

the time came if he had to have his money, there would not be any trouble between us. He could have the right to sell the property and pay himself and if I didn't have the money and he had to have his settlement with the bank (from which he was borrowing the money), I would get out of there and give him a quitclaim deed. . . . He said he hated to go into debt, but he would do it for me." On the same day the parties met at the office of Winston's attorneys, and steps were taken for consummating the transaction. It was finally concluded in this form: The plaintiffs executed and delivered to Carolina M. Winston a grant, bargain, and sale deed purporting to convey the property subject to the lien of the mortgage of the German American Savings Bank, and of unpaid taxes. The deed recited a consideration of two hundred dollars. Mrs. Winston executed and delivered to the plaintiff Susie G. Coutts, an instrument, in form a lease of the property for one year from September 19, 1902, in which Mrs. Coutts agreed to pay the sum of one hundred and fifty dollars as rent, and was given, on condition of her paying the rent of one hundred and fifty dollars, the option of purchasing the property at any time before the nineteenth day of September, 1903, for \$2,150. This amount of \$2,150 was actually paid out by Mrs. Winston. She satisfied the mortgage of the German American Savings Bank, expending \$1,950 for this purpose, and paid two hundred dollars in cash to Coutts. The two hundred dollars, as Coutts says, is an amount which he asked Winston to loan him over and above what was needed to pay the bank. It was to pay other debts owing by Coutts. The rent of one hundred and fifty dollars, fixed in the "lease" is seven per cent of \$2,150, and this was the rate of interest paid by Mrs. Winston on the loan negotiated by her to raise this money.

The plaintiffs remained in possession of the property. At the end of the year Coutts paid to the defendants two hundred dollars, and received an extension of the option for one year. In the following year, 1904, Coutts sought further extension, and this was granted by the Winstons for a period of six months. No payment was made by the plaintiffs within the time as so extended, their efforts to make a sale of the property having been unsuccessful. In August, 1905, the plaintiffs tendered to Mrs. Winston the amount advanced

by her, with interest and costs, and demanded a reconveyance. This tender and demand were refused.

At the time of the execution of the deed, in September, 1902, the land in controversy was worth, with improvements, some thousands of dollars in excess of the debt to the German American Savings Bank.

Much of the foregoing statement is based on the testimony of the plaintiff John F. Coutts. In some particulars it is corroborated by other witnesses. In many important respects it is flatly contradicted by the defendants' witnesses. But, as we have said, questions of weight or preponderance of evidence are not for this court. The trial court had the right to accept Coutts's testimony as true, and evidently did so. Thus accepted, it was plainly sufficient to justify the finding that the deed in question was intended as a mortgage to secure a loan of \$2,150 made by the defendant Carolina M. Winston. It is urged that there is no direct evidence of a promise by either of the plaintiffs to repay the amount advanced, and that there can be no mortgage if there is no indebtedness. (*Ahern v. McCarthy*, 107 Cal. 382, [40 Pac. 482]; *Henley v. Hotelling*, 41 Cal. 28.) But if, as Coutts says, he applied to the defendants for a loan, and they acceded to his request, a promise on his part to repay the money advanced in consequence of these negotiations is to be implied in fact as well as in law. The circumstances of the whole case, if we accept the testimony acted on by the trial court, are entirely consistent with the view that the parties, while in fact agreeing on a loan to be secured by mortgage, were desirous, for reasons of their own, of giving the transaction a different appearance. The plaintiff John F. Coutts being unable to pay the mortgage upon his home, which was of much greater value than the debt, applied to his sister and her husband for help. They furnished the money necessary to pay the mortgage and other pressing debts, taking a deed of the land, and giving a paper by which the plaintiff was bound to pay interest on the amount furnished, and was given the right to get his land back within a year upon payment of the principal sum. Mrs. Winston had theretofore had unpleasant relations with a sister, from whom she had taken a mortgage which she had been compelled to foreclose. She was particularly desirous of avoiding foreclosure proceedings. Under these

circumstances, it was not unreasonable for the trial court to conclude that the defendants agreed to lend Coutts the money upon the security of his land, and attempted to put the transaction in such form that no foreclosure would ever become necessary. Coutts's promise to give the Winstons a quitclaim deed if he did not have the money does not conflict with the theory of a loan secured by mortgage. It was merely an additional assurance to the defendants that they would not have to resort to a foreclosure to bar the plaintiffs' title. Indeed, the fact that such deed was thought necessary tends to show that the plaintiffs understood that they were retaining an equity which would not be lost by the mere failure to pay within the time specified in the lease.

On the whole case, we are satisfied that the court was justified in making the finding assailed.

The judgment and order denying a new trial are affirmed.

Angellotti, J., Lorigan, J., and McFarland, J., concurred.

Shaw, J., and Henshaw, J., dissented.

Rehearing denied.

[S. F. No. 4689. Department Two.—June 4, 1908.]

ANGLO-CALIFORNIAN BANK, Limited, Appellant, v.
NORMAN GRISWOLD et al., Respondents.

ACTION TO FORECLOSE MORTGAGE—NOTICE OF APPEARANCE COMPLETE WITHOUT FILING—CONSENT TO JUDGMENT—FILING REQUIRED ONLY FOR JURISDICTION.—Where defendants in an action to foreclose a mortgage by deed were served with summons, and gave notice to the plaintiff of their appearance and consent to judgment, the appearance was complete when the notice thereof was served; and no particular time was required within which to file the same, the only object of filing the notice and consent being to give the court jurisdiction to render judgment against the defendants.

ID.—EXCUSABLE DELAY IN FILING NOTICE AND CONSENT—REQUEST FOR DELAY BY DEFENDANTS.—Where the plaintiff delayed filing the notice of appearance and consent to judgment at defendants' request, they hoping that the property would increase in value, and sanctioning sales by plaintiff at any time, the delay in filing the same until after three years was excusable.

ID.—DEATH OF ONE DEFENDANT—APPEARANCE OF CO-DEFENDANT, AND AS EXECUTRIX BY ATTORNEY—CONSENT TO JUDGMENT—TRIAL—SUBMISSION—ERROR IN DISMISSAL.—Where one defendant died before the stipulation was filed, and the co-defendant appeared by attorney for herself and as executrix of her deceased husband, and consented to foreclosure under stipulation against the docketing of any deficiency judgment, and the case was tried accordingly and submitted for decision, before a motion for dismissal was made, it was error for the court thereafter to dismiss the action under subdivision 7 of section 581 of the Code of Civil Procedure, for want of prosecution, on motion of a second mortgagee claiming under the defendants, and of a creditor of the estate of the deceased defendant, the defendants themselves being the only parties to the action.

APPEAL from a judgment of the Superior Court of Sonoma County. Emmett Seawell, Judge.

The facts are stated in the opinion of the court.

Jesse W. Lilienthal, for Appellant.

Walter H. Robinson, for Wm. C. Spencer, Respondent.

Jordan & Brann, and Jordan, Rowe & Brann, for Eliza S. Eldridge, Respondent.

HENSHAW, J.—This is an appeal from a judgment of dismissal granted upon the motions of William C. Spencer and Eliza S. Eldridge, under the authority of subdivision 7, section 581 of the Code of Civil Procedure, and also upon the ground that "plaintiff has abandoned the prosecution of said action and has failed to prosecute the same with due or any diligence."

The action is to foreclose mortgages upon real estate executed by Norman W. Griswold and Anna E. Griswold, his wife. These mortgages were in the form of deeds absolute. The complaint was filed April 26, 1898, and summons then issued. In the moving affidavits it is alleged, upon in-

formation and belief, that the summons was not served. This is expressly denied by the affidavits filed on behalf of plaintiff, whereby it is established that the summons was served upon the Griswolds, and that upon July 14, 1898, they executed and delivered to plaintiff the following:—

“To the clerk of said court:

“You will please take notice that we and each of us herewith enter our appearance in the above-entitled action and consent that judgment may be entered in favor of plaintiff herein as prayed for in said complaint.

“Dated July 14th, 1898.

“NORMAN W. GRISWOLD,

“ANNA E. GRISWOLD.”

It is further shown by plaintiff that the Griswolds had requested the plaintiff not to proceed with the foreclosure, in the hope and expectation that the mortgaged property might increase in value so that they would be able to pay the mortgage debt from the proceeds of sales of parts of it. Thus, upon June 7, 1899, the Griswolds executed to plaintiff an authorization “to sell or convey any and all pieces of property heretofore conveyed to you by us, or either of us, to any party or parties you may decide, and at such figures or upon such terms as you may determine, crediting all proceeds from the sale of said property to our or either of our indebtedness to your bank, and we hereby ratify and confirm any sales or conveyances you may make under this authorization.” So, whatever the delay in bringing plaintiff’s action to a judgment, it was attributable solely to the defendants’ instance and request. It was granted out of consideration for them and for what they believed to be their best interests. In June, 1899, W. C. Spencer, one of the movents herein, commenced his action against the Griswolds to foreclose his mortgage lien upon some of the property affected by plaintiff’s suit. In that action this plaintiff filed its answer, setting up its mortgages. Spencer seems to have regarded the pleading of this plaintiff in his action as a cross-complaint, since he filed a reply thereto which he styled “plaintiff’s answer to defendant’s cross-complaint.” Negotiations followed between this plaintiff and Spencer, to the end that the mortgages should all be foreclosed

in the same action. The Spencer suit remained pending from June, 1899, to August, 1905. When it came to trial, upon August 16, 1905, objection was made to the foreclosure in the Spencer suit of plaintiff's mortgages. Then immediately, upon the afternoon of that day, this plaintiff brought this cause to a hearing, introduced evidence in its support, and introduced in evidence and filed in court the appearance of the Griswolds above set forth. After taking evidence the trial judge directed that a form of minute order and decree be prepared and presented to him. Norman W. Griswold at this time was dead, and his wife was executrix of his last will and testament. Communication was had by plaintiff with Mrs. Griswold and her attorney, and her consent was obtained to be substituted as executrix in the plaintiff's action in the place of her deceased husband, it being agreed that no deficiency judgment should be taken. Appellant then prepared a form of decree and minute order in conformity with this understanding, which met the approval of Mrs. Griswold and her attorney, and thereafter submitted these papers to the trial judge for signature. Thus plaintiff's action had been brought to trial and was ready for decision three months before the motion to dismiss was made. As to the interest of the moving parties, Spencer's claim to relief is sufficiently outlined. He succeeded to the Griswolds' title under his foreclosure proceedings. Mrs. Eliza S. Eldridge asserts she is a creditor of the estate.

Respondents' first contention in support of the dismissal which they obtained is one of strict law, based upon what they assert to have been plaintiff's failure to comply with the mandatory provisions of subdivision 7 of section 581 of the Code of Civil Procedure. An appearance in an action under the laws of this state is defined by section 1014 of the Code of Civil Procedure. "A defendant appears in an action when he answers, demurs or *gives the plaintiff written notice of his appearance*, or when an attorney gives notice of appearance for him." It appears indisputably that the Griswolds gave to plaintiff a formal notice in writing addressed to the clerk of the court, not instructing the clerk to enter an appearance, but declaring that "herewith we do enter our appearance," and this appearance was coupled with the consent that judgment might be entered in favor of plaintiff as prayed for in the complaint.

Here was a strict compliance with the provisions of section 1014. The defendants gave to plaintiff written notice of their appearance. The only default, then, so far as subdivision 7 of section 581 is concerned, was in the failure of plaintiff to file this appearance within three years. But in terms this subdivision does not require a filing. It declares, "But all such actions may be prosecuted, if appearance has been made by the defendant or defendants, within said three years in the same manner as if summons had been issued and served." The appearance was made within three months after the commencement of the action, by the giving to plaintiff of the written notice of appearance. Neither section 1014 nor section 581 required that the appearance should be filed within three years, or within any specified time. The time limited by section 581 is for the making of an appearance, which, we repeat, is made when written notice of appearance is given to plaintiff.

Of course, jurisdiction of a defendant is not acquired until the filing of such appearance in court (*Cooper v. Gordon*, 125 Cal. 300, [57 Pac. 1006]), but the principal purpose of section 1014 of the Code of Civil Procedure is served in that, after giving written notice of appearance to plaintiff, the defendant is entitled to notice of all subsequent steps and proceedings in the action. In *Cooper v. Gordon*, 125 Cal. 300, [57 Pac. 1006], it was held that a stipulation by defendant consenting that plaintiff might take judgment, though not filed until long after the three years, was when filed, an appearance, and a waiver of the provisions of subdivision 7 of section 581 of the Code of Civil Procedure, and estopped the defendant from moving to dismiss under the provisions of this section. In *Roth v. Superior Court of Los Angeles County*, 147 Cal. 604, [82 Pac. 246], the parties entered into a stipulation extending the defendant's time to plead. The stipulation was not filed and the time was further extended by verbal stipulation until more than three years after the commencement of the action. The summons was never returned, and after the expiration of the three years defendants moved to dismiss, whereupon, in answer to the motion, plaintiff filed the stipulation. This court declared the unfiled stipulation to be an appearance, saying: "The stipulation, signed as it was by petitioner's attorneys in the action, was a virtual appearance, and none the less so because it was not filed." The case at bar is much stronger. Here the

stipulation had been filed, evidence taken, and the cause submitted for judgment months before the motion to dismiss was made. Even if it be conceded (though it is not decided) that subdivision 7 of section 581 contemplates that such appearance shall be filed within three years, yet, the failure in this instance was, as in the cases above cited, justified and excused. If, then, the trial court dismissed this action in the belief that the language of subdivision 7, section 581, made it mandatory to do so, it follows from what has been said that the court fell into error in so doing. As pointed out in *Cooper v. Gordon*, 125 Cal. 300, [57 Pac. 1006], even the mandatory terms of the statute would not justify a dismissal in all cases as against the protest of the defendant who desired a trial.

Even less merit attaches to the second position taken by respondent that the court was justified in dismissing the action because plaintiff had abandoned his cause and had failed to prosecute it with diligence. Plaintiff had prosecuted the case to judgment before the motion was made, and assent to the judgment was actually given by Mrs. Griswold for herself and as executrix of her husband's estate. The reason of the delay was fully explained as has above been set forth, and the attitude of the Griswolds themselves, the only defendants in the action, is sufficiently evidenced by the conduct of the widow. She manifestly recognized the justice of plaintiff's claim and its right to a judgment. It was an abuse of discretion, therefore, for the court to have dismissed upon the ground last indicated.

For which reason the judgment of dismissal is reversed and the cause remanded.

Lorigan, J., and McFarland, J., concurred.

Hearing in Bank denied.

[S. F. No. 4566. Department Two.—June 4, 1908.]

NAPA STATE HOSPITAL, by C. B. SEALEY, Treasurer,
Respondent, v. EMANUELLO DASSO, an Insane Per-
son, Appellant.

INSANE PERSONS—LIABILITY FOR CARE IN STATE HOSPITAL.—An action may be maintained by a state hospital by its treasurer, against an insane person confined therein under a regular order of commitment, who owns property, to recover judgment for his care, support, and maintenance, under the act of the legislature, known as the "Insanity Law," approved March 31, 1897.

ID.—EVIDENCE—REGULARITY OF COMMITMENT—COLLATERAL ATTACK—PRELIMINARY STEPS—PRESUMPTION.—Upon a collateral attack upon the order of commitment, in such action, made many years subsequent to the order, which shows upon its face that the examination was had while the insane person was before the judge at the hearing, it is unnecessary to prove the requisite preliminary steps, but it will be presumed in the absence of contrary proof, that such steps were regularly had.

ID.—NAME OF PERSON COMMITTED AND PERSON SUED—PRESUMED IDENTITY—DIFFERENCE IN SPELLING—IDEM SONANS.—Where the commitment was of "Emanuel Tasso," and the person sued was "Emanuello Dasso," and it appears that the difference in the given name was merely the difference between the English and Italian method of spelling, the court properly treated the surnames as *idem sonans*.

ID.—ACTION BROUGHT UNDER ACT OF 1897 UNAFFECTED BY REPEAL.—Where the action was brought under the act of 1897 it was unaffected by the repeal of that act pending suit, there being an express reservation of pending actions previously commenced, which must be prosecuted to final determination in the manner and form in which it was brought.

ID.—CONSTITUTIONAL LAW—SPECIAL LEGISLATION AS TO PRIVATE CORPORATIONS—PUBLIC CORPORATIONS UNAFFECTED.—The provisions of the constitution forbidding the organization of private corporations by special legislation are inapplicable to the formation of public corporations organized for governmental purposes, and which are state agencies, subject to the control and government of the state.

ID.—CONSTITUTIONALITY OF INSANITY ACT.—The Insanity Act of 1897 is constitutional and valid. The right conferred therein upon state hospitals to recover for the care and maintenance of insane persons confined therein, is not special or class legislation.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. James M. Seawell, Judge.

The facts are stated in the opinion of the court.

James A. Devoto, and Devoto & Richardson, for Appellant.

U. S. Webb, Attorney-General, and John W. Stetson, for Respondent.

LORIGAN, J. This action was brought to recover a specified sum for the care, support, and maintenance of Emanuello Dasso alleged to be confined in the Napa State Hospital as an insane person by virtue of an order of commitment duly made and given by the superior court of the city and county of San Francisco after proceedings regularly had, and is maintained by plaintiff under the act of the legislature known as the "Insanity Law," approved March 31, 1897. (Stats. 1897, p. 311.)

A judgment was rendered for plaintiff and this appeal is taken by defendant from an order denying his motion for a new trial.

It is first insisted that the court erred in the admission of evidence.

On the trial plaintiff offered, and the court admitted in evidence over the objection of defendant, an order of commitment dated February 2, 1897, made by one of the judges of the superior court in and for the city and county of San Francisco, reciting that *Emanuel Tasso* had been personally brought before said judge for examination on a charge of insanity, and that upon examination of the witnesses called, and after a personal examination, was found to be insane by said judge, and by him ordered committed to the insane asylum at Napa.

It is asserted that the court erred in overruling the objection of the appellant that no proper foundation had been laid by respondent for the admission of the order.

While it is claimed by appellant that proceedings in matters of insanity were at the date of the commitment here in question required to be had under section 2168 of the Political Code, and by the respondent that they were to be had under section 17 of an act providing for the management of the Napa State Asylum for the Insane (Stats. 1875-76, p. 137), it is not questioned by appellant but that under either provision of the law (and they are substantially the same)

the judge of the superior court had power and jurisdiction to order the commitment of insane persons to the Napa asylum. The point made is that plaintiff should have offered in evidence the affidavit charging insanity, the warrant of arrest, the record of the examination and all the other preliminary proceedings required to be taken, and upon which the commitment was based, before the commitment itself was admissible in evidence.

We do not think this point well taken. It will be observed that this attack upon the order of commitment is a collateral one made many years subsequent to the making of the order. Under the law the judge was vested with power to make such commitments, and, hence, had jurisdiction of the subject-matter. The order shows that the examination which eventuated in the commitment here in question was had while *Tasso* was personally before the judge at the hearing. From the recitals it sufficiently appears, as against a collateral attack, that the court had jurisdiction of the alleged insane person, and in the absence of any showing to the contrary it will be presumed that the preliminary steps which the law required to be taken in order to warrant the adjudication of insanity were regularly had.

It is of no moment that the proceedings here in question were before a judge of the court acting by virtue of a special power conferred, and not a proceeding in court under the general jurisdiction of such tribunal. Power having been conferred upon the judge to hold such examination and determine the question of insanity and commit to an asylum, his orders made by virtue of such authority, and which from the recitals upon their face and the legal implications arising therefrom show jurisdiction, are no more subject to collateral attack than the orders of a superior court acting in a proceeding by virtue of special authority, which it must be conceded are not. (*Matter of the Application of Clary*, 149 Cal. 732, [87 Pac. 580].) To allow orders made by competent authority to be attacked collaterally at any time would be to defeat the object sought in conferring it and practically to ignore it. (*Van Fleet on Collateral Attack*, p. 902.)

The ruling of the court under the objection we are considering was therefore correct.

But it is further insisted that the order was inadmissible because it purported to be the commitment of one *Emanuel Tasso* to the asylum, and there was nothing in evidence to show that *Emanuel Tasso* and *Emanuello Dasso*, the defendant and appellant, were the same person. Of course, as far as the name *Emanuel* or *Emanuello* is concerned, no point is made, as the one is the English and the other the Italian method of spelling. The stress of the objection, however, is laid on the surname *Tasso* and *Dasso*, the claim of appellant being that each represents a separate and distinct family name pronounced entirely different. If this is true there was no evidence of it. The trial court undoubtedly considered the names *Tasso* and *Dasso* as *idem sonans*. Whether one name is *idem sonans* with another is a question of pronunciation, not of spelling. Strict accuracy in the spelling of names is not required in legal proceedings. Though a name be inaccurately written, still, if when pronounced it conveys to the ear a sound practically similar to the correct name when pronounced, the rule of *idem sonans* obtains and identity of person will be presumed from similarity of sound in the pronunciation of the names. The letter "T" is convertible with the letter "D," and is at most but a mute articulation (Webster's Dictionary, letters T and D), and these letters have by the courts been considered as interchangeable so as to apply to their use the doctrine of *idem sonans*. For example, "Hudson" for "Hutson" (*State v. Hutson*, 15 Mo. 512); "Witt" for "Wid" (*Veal v. State*, 116 Ga. 591, [42 S. E. 705]). As to the use of the letters "D" and "T" in the cases cited, it was held that the only difference between them was the very slight difference in the articulation of the letters and that *idem sonans* applied. It was, therefore, for the court to say after hearing the pronunciation of the name "Dasso" by the witnesses in the case, whether, though incorrectly spelled "Tasso" in the order of commitment, it conveyed to the ear when pronounced practically the same sound as would be conveyed by the pronunciation of the name if correctly written "Dasso." It undoubtedly concluded that it did, and under the cases cited was warranted in doing so.

These are the only points made by the rulings of the court in the admission of evidence.

At the conclusion of respondent's case the appellant moved for a nonsuit, among other grounds insisting that the plaintiff had no legal capacity to maintain the action and that the act of March 31, 1897, under which it was brought was unconstitutional for various reasons. The nonsuit was denied and it is urged here that it should have been granted. We think not. The points that are made as to want of legal capacity in the plaintiff to maintain the action are, 1. That the action was commenced while the Insanity Law of March 31, 1897 (Stats. 1897, p. 311), was in force and under its provisions; that said act was repealed by the act of March 26, 1903 (Stats. 1903, p. 485), creating the state commission of lunacy and defining its powers; that the repeal of the act of 1897, giving the right of action, operated as an extinguishment of that right, and no law thereafter existed authorizing a judgment to be rendered against defendant; 2. That if this was not the effect of the repeal, nevertheless, the action should have been brought by the trustees of Napa State Hospital and not by the plaintiff as treasurer thereof.

This second point made by appellant is disposed of adversely to him in *Napa v. Yuba County*, 138 Cal. 378, [71 Pac. 450], where it is expressly held that such a suit is properly brought by the treasurer of the hospital.

As to the first point, it is equally disposed of adversely to appellant by the statute of 1903 repealing the act of 1897 because that act expressly provides that: "No action or proceeding commenced before this chapter, or any amendments thereto, takes effect, and no rights accrued are affected by its provisions. Any action or proceeding commenced . . . may be maintained and prosecuted to final determination in the manner and form in which the same was brought." As this action was commenced in 1901 and before the repeal of the act of 1897, it comes within the benefit of the reservation in the act of 1903 immediately quoted.

As to the constitutional objections raised to the act of 1897, it is claimed that this act establishing the Napa State Hospital was unconstitutional, as violative of section 1 of article XII of the constitution, declaring that no corporation can be created by special act. This section reads as follows: "Corporations may be formed under general laws, but shall not be created by special act. . . ."

Section 4 of this same article defines the term "corporations" as used in section 1 to be as follows: "The term 'corporations' as used in this article, shall be construed to include all associations and joint-stock companies having any of the powers or privileges as corporations not possessed by individuals or partnerships. . . ."

It is apparent from these sections quoted, considered by themselves and in relation to the entire article XII of the constitution, dealing with corporations, that the corporations thus referred to are private corporations. They have no relation to corporations such as state hospitals for the insane, which are public corporations under the control and government of the state, and created and acting merely as state agencies for the protection of society and the betterment and amelioration of the condition of those citizens of the state who have the misfortune to be insane. These are created to discharge a purely beneficent and governmental function pertaining to the care and treatment of unfortunate members of the community, and exist for governmental purposes solely. They are strictly public institutions, whose maintenance is provided for by legislative appropriations on the part of the state, whose trustees or managers are appointed by the governor, and are in fact public officials whose duties are fixed by express provisions of law, and whose conduct and management is under the exclusive control of the state. They are entirely distinct from either private or municipal corporations; constitute purely public corporations acting as agencies of the state for governmental purposes exclusively. They need not have been created as corporations at all, and their creation as such and endowment with corporate powers was in order that the duties imposed upon the officials thereof and the administration of such institutions might be discharged more conveniently and effectually. So the Napa State Asylum, being a public corporation under the act, created solely as an agency of the state for governmental purposes, the section of the constitution relied on by appellant can have no application to its creation as a corporation.

On the subject of the nature of such corporations, see *White v. Alabama Insane Hospital*, 138 Ala. 479, [35 South. 454]; *Maia's Administrator v. Directors of Eastern State Hospital*, 97 Va. 507, [34 S. E. 617].

As to the other constitutional objection that the act in question is, as to the right to recover from the estates of insane persons confined in the state hospital, class legislation, because providing a right of action against the estates of those confined therein only, and inapplicable to estates of those not confined therein, it is effectually disposed of in *People ex rel. Moore v. King*, 127 Cal. 570, [60 Pac. 35], and in the *Estate of Yturburru*, 134 Cal. 567, [66 Pac. 729], and a reference to those cases is all that is necessary to be said on the subject. While other constitutional objections are also made, we deem them untenable.

The order appealed from is affirmed.

Henshaw, J., and McFarland, J., concurred.

Hearing in Bank denied.

[S. F. Nos. 4633, 4758. Department Two.—June 6, 1908.]

BARBARA E. BROWN, Executrix of Will of John A. Brown, Deceased, et al., Appellants, v. TOWN OF SEBASTOPOL, Respondent.

ACTION BY EXECUTRIX TO QUIET TITLE TO PUBLIC STREET—CROSS-COMPLAINT BY TOWN—SPECIFIC PERFORMANCE—TITLE HELD IN TRUST—PRESENTATION OF CLAIM NOT REQUIRED.—In an action by an executrix to quiet title (with other lands) to a tract of land occupied by defendant town as a public street, where the town by cross-complaint sought to enforce specific performance of a contract between the town and the testator to convey such tract of land to the town as a public street, for an adequate consideration in services fully performed by the town, and the further payment of fifty dollars, which was tendered to plaintiff and refused, such cross-complaint seeks to enforce a conveyance of real property held in trust by the testator, and no presentation of the claim on the part of the town was required to be made to the executrix, in order to maintain the cross-complaint.

ID.—FAIRNESS OF CONTRACT—ADEQUACY OF CONSIDERATION.—Where the cross-complaint fully shows the fairness of the contract sought to be specifically enforced, and the adequacy of the consideration therefor, it is not demurrable for not alleging facts showing that it was just and reasonable as to the testator.

IN.—MUTUALITY OF REMEDY—AGREEMENT TO PERFORM PERSONAL SERVICES—FULL PERFORMANCE—ENFORCEABLE CONTRACT.—Where the contract provided that in consideration of the agreement to convey the land for a public street, the opening of which was beneficial to the testator's remaining lots, the town was to remove his buildings therefrom upon other lands belonging to him, and would lay out, open up, grade, and oil the street in front of his lots, besides paying him the sum of fifty dollars, although the contract would not be enforceable for want of mutuality of remedy, while such services remained unperformed, yet where the cross-complaint alleges full performance of such services on the part of the town, it shows a cause of action to enforce the contract *in specie* against the testator's estate.

ID.—PAROL CONTRACT — PART PERFORMANCE — POSSESSION BY TOWN—ACTS OF DISCLAIMER BY TESTATOR—ESTOPPEL.—The irregularity that the contract rested in parol is obviated, where the contract was partly or fully performed, and the town was let into possession of the land by the testator, and induced to expend money on the faith of the contract, and the testator disclaimed title thereto before the trustees of the town, and was relieved from paying taxes thereon. Under such circumstances, his representatives are estopped from retaining the benefits, while refusing performance on their part.

ID.—PRIVATE CONTRACT OF MUNICIPAL CORPORATION—DOCTRINE OF ESTOPPEL.—The private contract of a municipal corporation in the acquisition of land by purchase, is construed by the same laws that govern the contracts of private persons, in similar cases, and the municipal corporation in relation to such contract, may invoke the doctrine of estoppel, and may be held subject thereto.

ID.—IRREGULAR JUDGMENT—AMENDMENT PENDING APPEAL—BENEFIT OF APPELLANTS.—Where the complaint to quiet title included lands not claimed by the town, and the specific performance was enforced as claimed by the cross-complaint, and judgment was inadvertently rendered that the plaintiffs take nothing by their action, an amendment of the judgment made after appeal taken to correct such oversight, and to give the plaintiffs the benefit of the remaining lands claimed by them, was not injurious to them, and they cannot complain thereof.

APPEAL from a judgment of the Superior Court of Sonoma County and from an order denying a new trial. Albert G. Burnett, Judge.

The facts are stated in the opinion of the court.

S. K. Dougherty, for Appellants.

L. G. Scott, and T. J. Butts, for Respondent.

CLIII Cal.—45

HENSHAW, J.—Plaintiffs sued to quiet title (with other lands) to a triangular piece of land situate within the corporate limits of the defendant town of Sebastopol, alleging title and right of possession in her testator. Defendant pleaded by way of answer and cross-complaint, in the cross-complaint alleging that during his lifetime John A. Brown, plaintiff's testator, entered into a contract whereby he agreed to sell and convey to the defendant town the real property in controversy, upon consideration expressed as follows: "That defendant would remove from said premises certain houses, buildings and structures then located thereon belonging to said John A. Brown, and place said houses, buildings and structures upon other lands belonging to said John A. Brown, and would lay out, make and put in condition for use a street along and across the lands of said John A. Brown . . . and would lay out, open up, make and put in condition for use Depot Street in front of and adjacent to the premises hereinbefore described, and would grade and put oil on that portion of said Depot Street in front of and adjacent to said premises hereinbefore described and in front of other lands and premises belonging to said John A. Brown, and that defendant would pay to said John A. Brown the sum of \$50 when the said Depot Street had been oiled as hereinbefore alleged." The complaint further alleged the performance by defendant of all the acts to be by it done, that defendant entered into possession of the disputed land with the acquiescence of Brown, and ever since has continued in such possession, and that upon the death of Brown fifty dollars was tendered to the executrix of his will, with the request that a deed be executed in conformity with the agreement; that the tender was refused and the right to a deed denied. It is then alleged that the services rendered and the sum agreed to be paid for the premises was and is a just, fair, and adequate consideration and price for the land therein described. Issue was joined upon this cross-complaint and a trial resulted in findings and judgment for the defendant. From this judgment and from the order of the court denying plaintiffs' motion for a new trial plaintiffs appeal.

A demurrer to the cross-complaint was interposed upon the ground that it failed to state sufficient facts, in this, that there was an absence of an allegation of a presentation of a

claim against the estate. But it is apparent from the cross-complaint that it is an action in equity to enforce a trust as to specific real property,—that plaintiffs hold legal title to a piece of land, which legal title in equity and good conscience they should be compelled to convey to defendant. It is well settled that where recovery is sought of specific property alleged to have been held in trust by the decedent at the time of his death, a party seeking such recovery is not asking payment of the claim from the assets of the estate, and is therefore not required to present his claim as a creditor of the estate. (*Byrne v. McGrath*, 130 Cal. 316, [80 Am. St. Rep. 127, 82 Pac. 559]; *Elizalde v. Elizalde*, 137 Cal. 634, [66 Pac. 369, 70 Pac. 861]; *Estate of Dutard*, 147 Cal. 256, [81 Pac. 519].) Appellants further contend that the complaint fails to present facts that will enable the court to say that the consideration is adequate and that the contract is just and reasonable as to the plaintiffs. But the complaint specifically alleges the fairness of the contract and the adequacy of the consideration, and is not obnoxious to demurrer upon this ground. It is again urged that there is no mutuality of remedy, because the contract could not be enforced against the town. (Civ. Code, sec. 3386.) While it is true that a part of the consideration moving from the defendant was in the nature of personal service and therefore not specifically enforceable, yet the situation here pleaded is that expressly contemplated by section 3386, where the defendant has fully performed, in which case it is well settled that the obligation, if in other respects specifically enforceable, may be enforced *in specie* against the party in default. It is so held in that class of cases where the consideration is, upon the one side, purely personal and in the nature of personal services, as instanced by *Owens v. McNally*, 113 Cal. 444, [45 Pac. 710], and *McCabe v. Healy*, 138 Cal. 81, [70 Pac. 1008].

The foregoing disposes of the objections urged to the sufficiency of the complaint. Coming to the evidentiary matters urged upon the appeal from the order denying the motion for new trial, the evidence showed that John A. Brown was the owner of a tract of land within the town limits of the town of Sebastopol, and that he had subdivided this land into lots and sold such of them as fronted upon the existing streets.

He desired the town to open a new street through his lands, the value of which to him, in the enhanced prices which he could obtain for his lots, being quite apparent. He submitted to the town trustees a proposition to the effect that if they would open, grade, and oil as a public street a certain specified piece of his land, removing at the town's expense the buildings upon the course of this proposed street, in a manner satisfactory to him, replacing them in such position as he might designate, and, after doing this, pay him fifty dollars in addition, he would deed to the town a triangular piece of land a little over one hundred feet on each side, which would remain upon the opening of this street, as a public square or plaza. He was asked to make the offer in writing, but he replied that it was unnecessary, that his word was as good as his bond. This matter of Brown's proposition was called before the board of trustees at one of its regular meetings and put to vote and duly accepted, though the minutes fail to contain a record of this fact. The town, however, proceeded with the work and completed it to the satisfaction of Brown, and with Brown's permission entered into possession of the disputed triangle. It is established, moreover, that after the work was done Brown appeared before the board of trustees as a board of equalization, objecting to the assessment to him of the triangular tract for the reason that it was no longer his, but was the property of the town, and the assessment was canceled and the tract never thereafter assessed. As to the value of the triangular lot, the testimony varies in fixing it from two hundred dollars to two thousand dollars. So far as the consideration paid by the town, it is shown that the moving of the buildings cost one hundred and seventy dollars and that forty dollars was expended to purchase oil to oil the road. Besides this there was the necessary labor in grading and oiling the road, and the value to Brown's other lands in having an open street constructed through them in the place and manner by him desired and without expense to him. The consideration is thus shown to have been adequate. The fact that some of the moneys thus expended in constructing the road were gathered by private subscription from the citizens and did not come directly from the town treasury cannot matter to appellants, and does not impair in the slightest degree the adequacy of the consideration. The finding of

the court that Brown entered into the agreement with the members of the board of trustees of the town of Sebastopol, instead of with the town of Sebastopol, is without significance. The members were acting for the town, and, as has been above stated, they accepted Brown's proposition in regular meeting on behalf of the town. The evidence establishes with sufficient clearness, as the court finds, that the consideration for the contract was as above set forth, and that by the town it had been fully performed.

The informality and irregularity in allowing this contract dealing with the transfer of lands so to rest in parol is of course apparent. But as laid down by Mr. Washburn (3 Washburn on Real Property, p. 215): "If under a parol contract to convey, and after part or full payment of the purchase money is made, the possession of the estate is delivered to and taken by the purchaser and he enters upon and occupies the estate, it takes it out of the statute of frauds." (See, also, *Weber v. Marshall*, 19 Cal. 447; *Moulton v. Harris*, 94 Cal. 421, [29 Pac. 706]; *Calanchini v. Branstetter*, 84 Cal. 253, [24 Pac. 149].) The town of Sebastopol is incorporated under the general laws of the state of California. (General Laws of Cal., chap VII, act. 2348, [Deering's ed. 1906, p. 635].) By subdivision 2 of section 862 thereof, power is conferred upon the corporation "to purchase real estate." It is well settled that the contract of a municipal corporation, when exercising other than its governmental functions, and within the limits of its charter powers, are construed by the same laws that govern the contracts of private parties. Thus the doctrine of estoppel in such a contract may be invoked on behalf of or against a municipality. Says Bigelow on Estoppel (sec. 1128): "But it is a well-settled principle, applicable alike to the states and the United States, that whenever a government descends from the plains of sovereignty and contracts with parties, such government is regarded as a private person itself, and is bound accordingly. A state in its contracts with individuals must be judged and must abide by the same rules which govern individuals in similar cases, and when such a contract comes before a court the rights and obligations of the contracting parties will be adjudged upon the same principles as if both contracting parties were private persons." (See, also, *Sacramento County v. Southern Pacific*

Co., 127 Cal. 222, [59 Pac. 568, 825]; *Contra Costa County v. Breen*, 139 Cal. 432, [73 Pac. 189].) We have here presented the case where, notwithstanding the irregularity and informality in the failure to reduce the contract to writing, the owner of the legal title induced defendant to expend moneys and make valuable improvements for the benefit of his remaining property, under promise to convey a specific piece of land. Defendant was, by the owner of the legal title, let into possession of this land, and the owner of the legal title made open disclaimer of his title before the trustees of defendant and caused himself to be relieved from the assessment upon the ground that it was defendant's property. Plaintiffs here seek to hold all the benefits, while refusing performance. They are estopped from so doing, under fundamental and well-settled principles. (*Des Moines and Fort Dodge R. R. Co. v. Lynd*, 94 Iowa, 368, [62 N. W. 806]; *Lane v. Pacific etc. Co.*, 8 Idaho, 230, [67 Pac. 656]; *McClanahan v. West*, 100 Mo. 309, [13 S. W. 674]; *Blood v. Serena L. & W. Co.*, 113 Cal. 221, [41 Pac. 1017, 47 Pac. 695]; *Carpv v. Dowdell*, 115 Cal. 677, [47 Pac. 695]; 1 Abbott's Municipal Corporations, sec. 259; *City of Buffalo v. Balcom*, 134 N. Y. 532, [32 N. E. 7].)

The court by its original judgment decreed that the "plaintiffs take nothing by their action." It appears that this was an inadvertence, since, to certain of the lands described in the complaint, no claim was made by the town. The court then amended this judgment by decreeing to plaintiffs, as against defendant, all the lands in the complaint described, excepting such lands as were described in defendant's cross-complaint. An appeal from the judgment was pending at the time this order was made. However irregular it may be said to have been, since it was manifestly in the interest of plaintiffs, and to correct a clear oversight, plaintiffs were not injured in any way and should not be heard to complain.

This disposes of all the questions which we deem necessary for a consideration, and for the reasons above given the judgment and order appealed from are affirmed.

Lorigan, J., and McFarland, J., concurred.

Hearing in Bank denied.

[S. F. No. 4503. In Bank.—June 8, 1908.]

J. S. MCGINNIS, Petitioner, v. MAYOR AND COMMON COUNCIL OF CITY OF SAN JOSE, Respondents.

MANDAMUS—STREET-RAILROAD FRANCHISE—DISCRETION OF CITY COUNCIL—ADVERTISEMENT OF APPLICATION.—Under the act of March 22, 1905, regulating street railroad and other franchises in counties and municipalities, the mayor and common council of a municipality have discretion whether or not to advertise an application for a street-railroad franchise, and to determine whether or not the franchise or privilege shall be granted at all, the only purpose of the act in this regard being to prevent the granting thereof in any other manner than that prescribed. *Mandamus* will not lie to control the discretion of the governing body of the municipality, as to whether they will advertise an application for such franchise.

Id.—WRIT OF MANDATE NOT ANTICIPATORY.—A writ of mandate cannot be issued which shall be effectual only in the event that the inferior tribunal or board shall subsequently determine a matter then pending before it in a certain way. The act which will be compelled must be one to the performance of which the complaining party is entitled at the institution of his proceeding; and it is the refusal or neglect to perform an act which is enjoined by the law as a present duty, that serves as the foundation for the proceeding.

PETITION for Writ of Mandate to Mayor and Common Council of the City of San Jose.

The facts are stated in the opinion of the court.

Partridge & Jacobs, Charles S. Wheeler, and J. F. Bowie, for Petitioner.

F. B. Brown, J. E. Richards, Cobb & Rea, J. C. Campbell, William B. Bosley, S. F. Leib, *Amicus Curiae*, and Harry L. Titus, and Morrison, Cope & Brobeck, *Amici Curiae*, for Respondents.

ANGELLOTTI, J.—Application for writ of *mandamus*, prayed to be directed against the mayor and common council of the city of San Jose, a municipal corporation.

Plaintiff, a resident, citizen, and taxpayer of the city of San Jose, seeks by this proceeding to obtain a writ of mandate requiring the defendants to advertise a pending application

for a franchise for certain street railroads in said city, in the manner provided by an act of the legislature of the state of California entitled "An act providing for the sale of street railroad and other franchises in counties and municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies, and repealing conflicting acts," approved March 22, 1905. (Stats. 1905, p. 777.) An alternative writ was issued upon the filing of the petition. The matter has now been submitted for decision upon a demurrer to the petition.

The questions upon which a decision is desired by counsel are: 1. Whether the act in question is applicable to the city of San Jose; and 2. Whether such act is void under certain provisions of our state constitution. While we fully recognize the importance of these questions, we are met at the outset by an objection to their consideration in this proceeding, which appears to us to be unanswerable. If we assume that the act in question is in all respects valid, and, further, that it constitutes the law applicable in the matter of granting street-railroad franchises in the city of San Jose, we are satisfied that plaintiff would nevertheless not be entitled to the relief sought herein, or any other relief within our power to give upon this application. If this be true, the questions above stated are practically relegated, so far as this proceeding is concerned, to the category of moot or abstract questions, the determination of which in petitioner's favor could not affect the result. Under such circumstances, we do not feel that this court would be warranted in entering upon their consideration.

It is alleged in the petition that on or about November 21, 1903, the San Jose and Santa Clara Railroad Company, a corporation, filed with the clerk of defendants, and presented to defendants, its petition for the franchise; "that the said mayor and common council propose and intend to grant the said franchise as petitioned for"; that they "have threatened and do now threaten to grant" the same, "without advertising in any manner in any newspaper . . . the fact of said application, and without so advertising any statement that they propose to grant the same, and without so advertising that bids will be received for such franchise and that it will be awarded to the highest bidder"; that each and every one of

them propose and intend to vote for the granting and they will grant the franchise petitioned for without requiring any payment therefor into the city treasury, and without any sale of such franchise; that no competition for the purchase of the franchise will be permitted, and the city will thereby be deprived of a large sum of money, and the burden of the taxpayer will be greatly increased; that petitioner himself desires to bid for such franchise, and if competitive bidding is not had, will be deprived of opportunity so to do; that on December 4, 1905, petitioner demanded of the mayor and common council that they advertise for sale the said franchise, and give an opportunity to petitioner and all others to bid therefor; that notwithstanding said demand, the mayor and common council refuse to so advertise.

The act of March 22, 1905, provides that every franchise or privilege to do certain things, including the construction or operation of street or interurban railroads upon any public street or highway, "shall be granted upon the conditions in this act provided, and not otherwise." It then specifies the procedure and conditions. When an application for a franchise is filed with the governing or legislative body of the county or municipality, "thereupon said governing body shall, in its discretion, advertise the fact of said application, together with the statement that it is proposed to grant the same," in one or more newspapers of the county or municipality for a certain designated period. This advertisement must contain a statement of the character of the franchise proposed to be granted, the proposed term, if it be a street railroad the proposed route; that the franchise will be awarded to the highest bidder, who must, during its life, pay to the county or municipality a certain portion of its gross annual receipts, and that sealed bids will be received up to a certain hour and day named therein. It then provides for the manner of said bids, the consideration thereof, the right of any person at the time of opening of the bids to bid a sum not less than ten per cent above the highest sealed bid, the sale by the governing body to the highest bidder, the execution of a bond by the successful bidder, the granting of the franchise by ordinance, and the commencement of work thereunder within a specified time.

It is very clear that this act invests the governing or other legislative body of the county, city and county, city, or town,

with the sole power to determine, in the exercise of its discretion, whether or not the franchise or privilege petitioned for shall be granted at all, and the only purpose of the act in this regard is to prevent the granting thereof in any other manner than that prescribed. The presentation of an application to such legislative body does not compel it to proceed to grant the franchise, or to take a single step in the direction of granting it. The legislature has been careful to expressly provide that such body, upon the filing of the application, shall "*in its discretion* advertise," etc. This, of course, does not mean that the body may in granting such a franchise in its discretion dispense with advertising, but it does undoubtedly mean that it may, in its discretion, refrain from taking any step toward granting a franchise for the thing asked. In other words, the question whether any such franchise shall be given to any one is, notwithstanding the presentation of the application, solely with such legislative body, to be determined by it in its discretion. It is elementary that *mandamus* will not lie to control the discretion confided by law to an inferior tribunal or board, and no one could contend with any show of reason that the legislative body of the city of San Jose could be compelled by *mandamus* to perform any of the acts essential under the act to the granting of the franchise, merely because an application for such franchise had been presented to it. This, we take it, is recognized by learned counsel for petitioner, and accounts for the presence in the petition of the allegations as to the intention of the mayor and members of the common council. But, however material these allegations might be in an application for a writ of prohibition to restrain action by the legislative body in violation of the provisions of the act, which, of course, would not lie, the functions of the body in such a matter not being in any degree judicial (see *Cameron v. Kenfield*, 57 Cal. 550; *Farmers' etc. v. Thresher*, 62 Cal. 407; *Hobart v. Tillson*, 66 Cal. 210, [5 Pac. 83]), or in a proceeding to enjoin any such action, they do not affect the matter before us. The discretionary power to refuse to take any step toward granting the franchise sought continues to the very moment of official action by the legislative body, notwithstanding any existing intention on its part or on the part of any of the members of the body as to how they will ultimately vote thereon, and as

long as that discretionary power exists we cannot control it by compelling action looking to the granting of such franchise. Such clearly would be the effect of granting the writ sought by petitioner herein.

We do not understand that a writ of mandate can be issued which shall be effectual only in the event that the inferior tribunal or board shall subsequently determine a matter then pending before it in a certain way. The act which will be compelled by *mandamus* must be one to the performance of which the complaining party is entitled at the institution of his proceeding. It is the refusal or neglect to perform an act which is enjoined by the law as a present duty that serves as the very foundation for the proceeding.

The point we have discussed is raised by the demurrer, and was expressly made by counsel on the oral argument. As we think that it effectually disposes of the proceeding, it will be unnecessary to consider any of the other propositions which have been elaborately and ably argued by learned counsel. If the act of March 22, 1905, is a valid act, applicable to the city of San Jose, and a franchise for a street railroad is granted in violation of its terms, doubtless an adequate remedy can be found in a proper proceeding.

The alternative writ of mandate heretofore issued is discharged, and the proceeding is dismissed.

Shaw, J., Sloss, J., Lorigan, J., and Henshaw, J. concurred.

[S. F. No. 4981. In Bank.—June 9, 1908.]

In the Matter of the Estate of ALPHEUS BULL, Deceased.
IRENE BULL, Widow and Sole Legatee, Appellant;
JOHN McDUGALD, Treasurer of City and County of
San Francisco, Respondent.

ESTATES OF DECEASED PERSONS—INHERITANCE TAX—CONSTRUCTION OF ACT OF 1905—ESTATES EXCEEDING TWENTY-FIVE THOUSAND DOLLARS—PRIMARY RATES.—Under section 3 of the Inheritance Tax Act of 1905, where the estate exceeds twenty-five thousand dollars in value, the primary rates imposed on the first twenty-five thousand dollars in section 2 of the act are to be computed, besides the

computation upon the excess over that sum, provided for in section 3. The reference in section 3 to section 2 of the act as to primary rates, shows the intention of the legislature to charge the primary rates in all cases, whether the estate is less than or exceeds twenty-five thousand dollars in value.

ID.—STRICT CONSTRUCTION OF TAXING LAW—EXEMPTIONS.—The rule favoring a strict construction of a taxing law, extends also to exemptions, as well as to impositions, and there should be a strict construction against an exemption which would yield absurd, unequal, and unjust results.

ID.—NUMBERING OF SECTIONS NOT CONTROLLING.—The numbering of the sections in statutes is a purely artificial and unessential arrangement resorted to for the purpose of convenience only, and can never be allowed to hinder a correct construction of the entire act.

APPEAL from an order of the Superior Court of the City and County of San Francisco fixing the amount of an inheritance tax. Thos. F. Graham, Judge.

The facts are stated in the opinion of the court.

Platt & Bayne, for Appellant.

Hartley F. Peart, for Respondent.

BEATTY, C. J.—This is an appeal by the widow and sole legatee from an order or decree of the superior court requiring her to pay an inheritance tax of \$2,062.07 on the net value of her deceased husband's estate, amounting to \$121,483.05. The following table shows how the probate judge computed the amount of the tax:—

| | Exemption. | Taxable Inheritance. | Rate. | Tax. |
|-------------------------|------------|-------------------------|-------|-----------------|
| 1st \$25,000..... | \$10,000 | \$15,000.00 | 1 % | \$150.00 |
| \$25,000 to \$50,000... | | 25,000.00 | 1½% | 375.00 |
| \$50,000 to \$100,000.. | | 50,000.00 | 2 % | 1000.00 |
| Excess over \$100,000. | | 21,483.05 | 2½% | 537.07 |
| | | | | <hr/> \$2062.07 |

The only item in this estimate excepted to is the first: one per cent of the fifteen thousand dollars remaining after deducting from the first twenty-five thousand dollars the widow's exemption of ten thousand dollars. The objection to this item,

amounting to one hundred and fifty dollars, is based upon appellant's construction of sections 2 and 3 of the act of March 20, 1905 (Stats. 1905, pp. 342, 343), by which the inheritance tax was imposed. It is contended that section 2 relates exclusively to estates not exceeding twenty-five thousand dollars in value and makes a wholly independent provision for estimating the amount of the tax on such estates, while section 3 deals exclusively with estates exceeding twenty-five thousand dollars in value (the case here), and by its terms imposes a tax only upon the excess over that sum. It is true that by section 3, read by itself and very literally, no tax is imposed except upon the excess over twenty-five thousand dollars of estates having a value exceeding that sum, but that section is not to be read by itself. The numbering of sections in statutes is a purely artificial and unessential arrangement resorted to for purposes of convenience only, and can never be allowed to hinder a correct construction of the entire act. Section 2 of this act does in terms and in fact relate exclusively to estates not exceeding twenty-five thousand dollars in value. It imposes a tax upon the unexempt portion of that sum, of from one to five per cent, according to the degree of relationship of the heir or devisee or legatee to the decedent. Section 3 imposes a tax according to a sliding scale on the excess over twenty-five thousand dollars in the case of all estates exceeding that valuation, but it does not, as counsel contend, omit or exempt the first twenty-five thousand dollars, for by its first clause it imports the provisions of section 2. It reads: "Sec. 3. *The foregoing rates in section two are for convenience termed the primary rates.* When the market value of such property or interest exceeds twenty-five thousand dollars, the rates of tax upon such excess shall be as follows:

"(1.) Upon all in excess of \$25,000 and up to \$50,000, one and one-half times the primary rates.

"(2.) Upon all in excess of \$50,000 and up to \$100,000, two times the primary rates.

"(3.) Upon all in excess of \$100,000 and up to \$500,000, two and one-half times the primary rates.

"(4.) Upon all in excess of \$500,000 three times the primary rates."

The clause in italics connects the two sections and gives to section 3 its proper construction. It shows that the intention

of the legislature was that the "primary rates" were to be computed in all cases.

The rule of strict construction is invoked by appellant—the rule, that is to say, that a statute will not be held to have imposed a tax unless it is clear and explicit. It is no doubt true that a taxing law is to be construed strictly, but the rule extends to exemptions as well as impositions, and the construction contended for by appellant would yield this absurd result: A widow succeeding to an estate of twenty-five thousand dollars would pay a tax of one hundred and fifty dollars; a widow succeeding to an estate of twenty-five thousand and one dollars would pay a tax of one cent and a half. A stranger in blood to the decedent taking by devise or bequest an estate of twenty-five thousand dollars would pay a tax of twelve hundred and twenty-five dollars, but if the estate was worth a dollar over twenty-five thousand dollars he would pay only seven and a half cents. We think a strict construction should be indulged against a rule of exemption so unequal and unjust as this would be.

The order and decree of the superior court is affirmed.

Henshaw, J., Shaw, J., Angellotti, J., Sloss, J., and Lorigan, J., concurred.

[S. F. No. 4493. Department Two.—June 10, 1908.]

HENRY E. BOTHIN et al., Appellants, v. THE CALIFORNIA TITLE INSURANCE AND TRUST COMPANY,
Respondent.

TITLE INSURANCE—RECORD TITLE—TENURE OF OCCUPANTS EXCEPTED—
TITLE BY ADVERSE POSSESSION NOT INSURED AGAINST.—Where a policy of title insurance, by its terms, only insured the record title to the property, and expressly excepted the "tenure of the present occupants," a title to a portion of the property acquired by adverse possession, is not insured against, and constitutes no breach of the covenant of title set forth in the policy.

ID.—ACTION FOR BREACH OF COVENANT—DEFECTS IN TITLE—TITLE OF ADVERSE CLAIMANTS QUIETED—TRUST-DEED BY STRANGER TO RECORD TITLE.—In an action to recover damages for alleged breaches of

the covenants in such policy of title insurance, for specified defects in the title, there can be no recovery either for the expense of defending an action to quiet title in which adverse occupants of a portion of the property prevailed, nor can a deed of trust executed by a stranger to the record title, constitute a defect in the record title insured against.

Id.—EFFECT OF RECORDING ACT.—The provisions of section 1213 of the Civil Code, that every conveyance of real property acknowledged and recorded is from the date of recordation constructive notice to subsequent purchasers and mortgagees, are inapplicable to a conveyance by one who is not in any manner connected with the title of record.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

Frank McGowan, and Geo. D. Squires, for Appellants.

Olney & Olney, for Respondent.

LORIGAN, J.—This action was brought to recover damages for breach of a covenant in a title insurance policy. The facts, either admitted or proven, are as follows: On March 1, 1900, the plaintiff H. E. Bothin having entered into a contract for the purchase from the Sharon Estate Company of City Slip lots 71 and 72 in the city and county of San Francisco, applied to the defendant, a corporation engaged in issuing title insurance policies, for a policy insuring the title to said lots.

On December 13, 1900, the defendant duly issued its policy of insurance on said lots, guaranteeing the title to the same to be in plaintiff, who at the same time took a conveyance thereof from the Sharon Estate Company.

Among other things, the policy provided that the defendant, The California Title Insurance and Trust Company, covenanted to indemnify and insure said plaintiff "from all loss or damage, not exceeding \$10,000, which the said assured shall sustain by reason of defects in the title of the assured to the estate or interest described in Schedule A, or by reason of liens or encumbrances affecting the same on the

13th day of December, 1900, . . . excepting only such as are specified in Schedule B; subject to the conditions and stipulations on the third page hereof, which with the schedules aforesaid are a part of this policy."

Schedule B referred to provides, in part, as follows: "Schedule B—defects of or objections to the title, and liens, charges and encumbrances thereon against which the company does not insure; 1. Tenure of the present occupants . . .; 4. Instruments, liens, encumbrances, judicial proceedings and pending suits not shown by any public record thereof in the city and county of San Francisco; and secret trusts known to the assured and not disclosed to the company." It appears that when this policy was issued there was, and for some time prior thereto had been, on record in the recorder's office of the city and county of San Francisco a deed of trust by which one P. M. Partridge conveyed to the trustees of the San Francisco Savings Union about fourteen feet of the westerly portion of said lot 71. Subsequent to the issuance of the policy to plaintiff it was discovered that the adjoining owners of property to the west of lots 71 and 72 described in the policy had encroached about fourteen feet thereon with their buildings, and that the buildings of plaintiff encroached to a like extent upon the owners of City Slip lots 73 and 74 on the east. In fact, it appeared that neither the owners of property to the west of the lots purchased by plaintiff nor the predecessors in title of plaintiff had erected their buildings on the true line, but respectively about fourteen feet easterly thereof. One of said encroaching owners was said P. M. Partridge, whose trust-deed above referred to was on record when the policy was issued. The description in that deed did not refer to lot 71 by name, and that it embraced any portion thereof could only be determined by a survey according to the calls of the trust-deed. Some question arising subsequent to the issuance of the policy as to the lines between them, Partridge brought an action against plaintiff to quiet his title to the fourteen feet of the westerly portion of lot 71 which was in his actual occupancy and which was embraced in his trust-deed, and one John A. Schmidt, adjoining him on the north, brought a similar suit against plaintiff to quiet title to about the same number of feet on the westerly portion of lot 72 which was in his

possession and occupied by his buildings. Judgment in these actions went in favor of the plaintiffs to the portions of lots 71 and 72 and their title quieted thereto. Plaintiff here likewise brought actions against parties claiming under the record title to about fourteen feet of the property to the east of said lots and beyond the easterly line thereof, but of which he was actually in the occupancy with his buildings, and obtained judgments quieting his title thereto.

It further appears from the findings that plaintiff here, while not obtaining possession of the entire property embraced within lots 71 and 72, obtained the identical property that he had looked at and had in mind when he obtained his deed from the Sharon Estate Company, and substantially of the same dimensions as there called for.

There is no claim that P. M. Partridge had any title of record to any portion of lot 71, or that the trust-deed executed by him embraced in its description any of the improvements of plaintiff which were supposed to cover the entire lot. Neither is there any claim that lot 72 was embraced within the calls of any instruments in writing, save those constituting the chain of title of plaintiff, and it is conceded that the plaintiff had the record title to both these lots.

The claim of plaintiff was that he had sustained damages embracing an amount which he had paid for attorney's fees and expenses in defending the actions brought by Partridge and Schmidt, as also damages for alleged depreciation in value of the property described in the policy, occasioned through the irregular shape in which the judgments in these suits left the remainder of the lots.

The court awarded judgment in favor of defendant, and from said judgment and the order denying his motion for a new trial, the plaintiff appeals.

The main point on this appeal is relative to the title of Partridge to the portion of lot 71 which was included in his deed of trust, it being insisted by appellant that there was a breach of the covenants contained in the policy by reason of this trust-deed being upon the record. Taking, however, into consideration the covenants of the policy, this claim is not tenable. It is quite clear from the conditions of that instrument that what was insured by the

respondent was that the record title to the lot was in appellant. It is not insisted, nor could it be, that Partridge had a record title to any portion of the lot in question. The evidence shows that he had not. In fact, it was admitted that the record title to the lot was in the appellant, and it is evident from the policy that this was all that the respondent insured. The only title which Partridge had was a title to a portion of the lot acquired by adverse possession, but this, the respondent not only did not insure, but expressly declared it did not in that provision of Schedule B wherein it is stated that, among other defects of or objections to the title not insured against, was the "tenure of the present occupants." "Tenure" is a term of extensive signification. While it means the mode by which one holds an estate in land, it imports any kind of holding from mere possession to the owning of the inheritance. (Bouvier Law Dic.; Anderson's Law Dic.: Term "Tenure.")

Now, the only title that Partridge held to the lot was the title acquired by adverse possession. His tenure of the property was exclusively that of an adverse occupant. He had no title of record and against his title acquired by reason of his adverse occupancy the policy expressly declared it did not insure when it provided it did not insure against the "tenure of the present occupant." As far as the record title to the lot is concerned, the respondent did insure it to be in appellant, but as against any title or right to the property asserted by one who might be in possession thereof, holding adversely to the record title, insurance was expressly denied. It was left to the appellant to determine by an inspection and examination of the property whether there was adverse occupancy or not; to determine for himself by actual measurement, survey, or examination of the premises whether he was getting what he contracted to purchase, or whether there was an adverse claim of title of any character by the occupants of the whole or any portion of the premises. Necessarily the record title is all that a title insurance company can safely or judiciously insure. While the title to real property may be disclosed by the record to be in one person, it may, in fact, be in another through adverse possession or in one in occupation of the property under an unrecorded conveyance. It is the

possibility of the existence of these conditions as to the title which an insurance company provides against by insuring the record title, and none other. In the case at bar the policy only insured the record title and as that is conceded to have been in appellant and the title of Partridge to the portion of the lot in question resting solely upon adverse possession against which respondent did not insure, there was no breach of the policy of insurance.

But it is claimed by counsel for appellant that the provision in Schedule B of the policy that the insurance company did not insure against "the tenure of the present occupants" is not controlling as to the responsibility of the respondent under the evidence in the case, but it is insisted that there was a breach of the policy as to the Partridge title under the fourth subdivision of Schedule B which provides that the company does not insure instruments, liens, or encumbrances not shown by any public record. The claim is that under this subdivision appellant was insured against any "defect" in the title disclosed by public records of the city and county of San Francisco, and that the deed of trust from Partridge to the San Francisco Savings Union was a "defect" in the title as that term is used in the policy of insurance. Undoubtedly, the policy does insure against any defect in the record title, but the trust-deed of Partridge was not a defect in such title. There was no title appearing of record in Partridge to any portion of the lot in question. There was no instrument of any kind or character of record which purported to convey any interest in this lot to him. He was not connected with the chain of title in any respect. That chain produced from the records showed the title to be in appellant. This being true, the deed of trust from Partridge created no defect in the record title. As far as the record title was concerned, Partridge was a mere interloper. One who is not connected by any conveyance whatever with the record title to a piece of property and makes a conveyance thereof, does not thereby create any defect in the record title of another when such title is deducible by intermediate effective conveyances from the original owners to that other. This we think so clear that it is idle to attempt to elaborate it. Such a deed would not even be constructive notice. Our code provides that every

conveyance of real property, acknowledged and recorded, is from the date of recordation constructive notice of its contents to subsequent purchasers and mortgagees. (Civ. Code, sec. 1213.) This language is very general, applying in terms to *every conveyance*, but it is held that this only contemplates conveyances by one having legal title to the property conveyed and is applied where there are conflicting conveyances made by persons claiming under the same common grantor. It does not apply to a deed by a stranger; one who is not connected in any manner with the title of record. No notice whatever is conveyed by such a deed. (*Long v. Dollarhide*, 24 Cal. 218; *Garber v. Gianella*, 98 Cal. 529, [33 Pac. 458]; *Sharon v. Minock*, 6 Nev. 377; *Rankin v. Miller*, 43 Iowa, 19; *Edwards v. McKernan*, 55 Mich. 526, [22 N. W. 20].)

It may be suggested, too, in this connection, that the loss to appellant of a portion of his lot 71 did not arise out of the alleged defect in the record title of appellant created by the trust-deed from Partridge, but for a cause entirely independent of it. It arose from the fact that Partridge had acquired title by adverse possession of the land; not from any defect in appellant's record title. This title by adverse possession respondent did not insure against, but expressly provided that it did not.

While there is involved in the appeal a claim of breach of the covenants as to that portion of lot 72 to which Schmidt had title by adverse possession, little need be said on the subject. What we have said relative to the Partridge title applies equally to the Schmidt title. As to this lot 72 there were no instruments of any character on record embracing any portion of it, except such instruments as made out the record title of appellant. Schmidt's tenure of the portion of lot 72 at the time of the issuance of the policy was solely that of an adverse occupant or claimant. He had no title of record and his title by adverse possession was not insured against, because, as we have seen, it was expressly provided in the policy that the respondent did not insure against "the tenure of the present occupants."

The judgment and order denying the motion for a new trial are affirmed.

Henshaw, J., and McFarland, J., concurred.

[S. F. No. 4351. Department Two.—June 10, 1908.]

KULLMAN, SALZ & CO., Respondent, v. SUGAR APPARATUS MANUFACTURING COMPANY, Appellant.

ACTION TO RESCIND PURCHASE OF MACHINE—WRITTEN CONTRACT—EXPRESS WARRANTY—EVIDENCE—ORAL REPRESENTATION AND IMPLIED WARRANTIES INADMISSIBLE.—In an action to rescind a written contract for the purchase of a machine containing an express warranty, all oral representations and implied warranties are merged in the written contract, and evidence thereof is inadmissible to vary its terms.

ID.—EXPRESS ALLOWANCE OF TIME TO EXPERIMENT.—The fact that by the terms of the written contract time was allowed for experiment with the machine, and that, in case it was returned, the advance payment was to be retained in consideration of the return of a second-hand machine, negatives the idea that there was any other warranty than that expressed in the written contract.

ID.—USE OF TRADE NAME IN CONTRACT.—The mere use of a trade name in the written contract cannot carry with it implied warranties not expressed in the contract.

ID.—CODE WARRANTIES NOT PLEADED OR PROVED.—Code warranties contained in sections 1767, 1769, and 1776, of the Civil Code, which were not pleaded or proved cannot be relied upon by the plaintiff.

ID.—BREACH OF EXPRESS WARRANTY—SUPPORT OF FINDING—CONFLICT—RESCISSION JUSTIFIED—ERROR IN EVIDENCE NOT PREJUDICIAL.—Where a breach of the express warranty was pleaded as a ground of rescission of the contract, and a finding of such breach was supported by the evidence for the plaintiff, notwithstanding conflicting evidence for defendant to the contrary, such finding and proof justified the judgment rescinding the contract, and the error in receiving inadmissible proof of oral representations and implied warranties was not prejudicial, and will not necessitate a new trial.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Gray & Leet, for Appellant.

M. B. Kellogg, and A. E. Shaw, for Respondent.

HENSHAW, J.—Plaintiff sued to rescind a contract for the purchase of a “Lillie triple-effect evaporator,” and for the recovery of such part of the purchase price as it had paid, because of the failure of the machine to meet the requirements of a warranty expressed in the written contract between the parties. Judgment was given for plaintiff, and from the judgment and order denying its motion for a new trial defendant appeals.

Plaintiff is a California corporation engaged in the business of tanning hides. Defendant is a corporation engaged in the manufacture of machinery in the state of Pennsylvania. As a branch of its business, it manufactures evaporating apparatuses and machines, one of which is, by its trade name, designated a “Lillie triple-effect evaporator.” In plaintiff’s process of tanning, the hides are successively dipped in tannic solutions of constantly increasing strength. These solutions are obtained by running water over the tanbark and leaching the tannin therefrom. The first and weakest solution to which the hides were subjected was one of eighteen or twenty degrees barkometer, and the solutions were gradually increased in strength to forty-five or fifty degrees barkometer. When there was a failure of the water to extract as high as eighteen or twenty per cent from the tanbark, the result was a solution unsuitable for tanning uses, and thus a waste product. Plaintiff conceived the idea that it might be able to employ an evaporating and condensing apparatus whereby the percentage of tannin in these low solutions could be so increased as to make them available for use. Plaintiff then came into communication with Mr. Lillie, president of the defendant company, who inspected the tannin solutions, and thought, and so stated, that the apparatus manufactured by his company would do the desired work. Plaintiff desired defendant to lend it one of its machines for experimental purposes, not only to see whether the machine would perform the desired work, but as well to learn whether its use would be consistent with the method of tanning employed by the company. Mr. Lillie declined to lend the machine, for the very obvious reason that, if not purchased, it would be returned without compensation, depreciated in value as a second-hand outfit. The conversations and negotiations be-

tween the parties resulted in the following agreement, which is pleaded in the complaint, and became, without doubt or dispute, the original contract between the parties:—

“Gentlemen:

“I beg hereby to affirm the proffer made by me verbally to Mr. Kullman this morning, which was:

“To sell to you the Lillie triple-effect evaporator with condenser (jet not surface) vacuum pump and engine referred to in our letter to you of the 13th inst. for the sum of four thousand and four hundred (\$1,400.00) f. o. b. Philadelphia, payable as follows, viz.: \$750.00 on acceptance of this proposition, \$750.00 on shipment of the plant, and \$2,900 ninety days after arrival of said shipment in San Francisco, you however to have the option of returning the apparatus (i. e., triple-effect, condenser, engine and vacuum pump, with all fittings and connections furnished therewith by us) at the end of the said ninety (90) days after the arrival of the shipment in San Francisco in lieu of making the said payment of \$2,900.00. Shipment of same to be by rail to The Sugar Apparatus Mfg. Co., Philadelphia, Pa., freight prepaid by you.

“It is to be understood that the return of the apparatus by you will give you no claim upon any part of the \$1,500.00 paid to us on account of it, and also that the apparatus is to be shipped, if returned to us, properly packed, and in as good condition as is consistent with sixty days use of it with average care.

“This triple effect is shown on the accompanying blue print 167A and will be delivered to you as shown on that print, with the addition of an engine for driving and circulating pumps and a vacuum pump and jet condenser in the place of the condenser shown on the print.

“With the usual supply of water to the condenser to maintain vacuum of 26 inches in the third effect, you will be able to evaporate three hundred (300) gallons of water per hour from your tannin solutions if the triple-effect is operated according to the written instructions which will be given to you in detail.”

Some delay followed in shipping the machine and in placing it in plaintiff's tannery. When so placed it worked unsatisfactorily. An expert of defendant came to the coast,

labored upon the machine, and finally reported it as being in a satisfactory condition and doing the work; whereupon, and because of the delay and the past unsatisfactory performance of the machine, a written modification of the original contract was entered into between the parties as follows:—

“It is agreed between Kullman, Salz & Company and The Sugar Manufacturing Company that this agreement is to substitute one dated June 20th, 1900, regarding price, although all other conditions referring to the efficiency of apparatus, etc., are still to remain in force as per original contract.

“It is hereby agreed that in consideration of one thousand dollars (\$1,000.00) paid by Kullman, Salz & Co., to The Sugar Apparatus Manufacturing Company, the receipt of which is hereby acknowledged, that the final and full payment of the triple-effect machine referred to in the original contract is to be \$2,000, which when paid at the expiration of ninety days from this date, is to be payment in full for apparatus complete, including freight and all incidental expenses.”

From this date plaintiff continued to operate the machine until, just before the limitation of the ninety days, which the parties seemed to agree was to run from June 14, 1901 (the date of the modification of the original agreement), plaintiff gave notice of rescission. Thereafter plaintiff commenced this action for rescission and the recovery of the portion of the purchase price which it had paid. Defendant answered, joining issue upon these matters, and by counterclaim sought a recovery of the unpaid portion of the purchase price.

The allegations of the complaint as to the breach of contract are as follows:—

“That the said apparatus mentioned in said written contract was warranted to be able to evaporate three hundred (300) gallons of water per hour, as specified therein, but that the apparatus delivered to said plaintiff under said contract was not able under the conditions specified, all of which were observed fully by plaintiff, to evaporate three hundred gallons of water under the conditions as specified in said contract, but failed very largely to accomplish the work required thereof.

"That plaintiff believed the representations of said defendant and entered into said contract solely by reason of said representations and the said warranty therein contained and said plaintiff was unable to ascertain the truth or falsity of said representations before entering into said contract. . . .

"That thereafter, and within due time, the said plaintiff notified said defendant that said apparatus and machine was not satisfactory in that the same did not evaporate three hundred gallons per hour as warranted and in fact fell very far short of said capacity, and that in other particulars said apparatus and machine did not fulfill the requirements specified in said contract and said plaintiff offered to return said apparatus to said defendant upon receiving a satisfactory machine or the amount theretofore paid by said plaintiff on account of the purchase price of said apparatus."

The principal contention between the parties upon this appeal turns upon the interpretation of the contract and the scope to be given to its terms. By appellant it is contended that the contract is clear, plain, and unambiguous; that the only warranty of defendant was that of the ability of the apparatus to evaporate three hundred gallons an hour under the conditions specified in the warranty—namely, if the apparatus "is operated according to the written instructions which will be given to you in detail"; that the only phrase in the contract, as to the interpretation of which, by any possibility, evidence should have been received, was the phrase "Lillie triple-effect evaporator"; and that when it was made to appear, as it does appear without question, that a Lillie triple-effect evaporator was in fact delivered to plaintiff, the need of taking further evidence upon this point was at an end.

By respondent it is contended that it has pleaded that plaintiff entered into the contract solely by reason of the "representations and the said warranty" contained in the written contract; that it was thus proper for it to show that the "Lillie triple-effect evaporator" was the trade name of a machine, which machine was held out to purchasers, under the defendant's book or catalogue, as possessing certain specified valuable properties and characteristics, as that it could be operated by exhaust steam without pressure, that it

was automatic in operation, and that it would not entrain, and therefore it was not necessary to use oil to prevent entrainment; that each of these representations were implied warranties running concurrently with the expressed warranty of capacity, and that plaintiff was, therefore, entitled to show a breach of any or all of them, even though they were not pleaded as warranties, but were pleaded merely as representations. Upon all of these matters the court adopted the contention of plaintiff and admitted evidence. It went even further than this, permitting plaintiff's manager to testify, as one of the representations made before the contract was entered into, that Mr. Lillie, after inspecting the plant and tannin solutions, told him "that he had an apparatus which would do that work and do it satisfactorily." The trial court in receiving this evidence did so under a sound declaration of the principles of law governing a written contract,—namely, that parol evidence may not be received to add to, detract from, or vary the terms of a written instrument, and that only when an ambiguity exists may parol evidence be employed to enable the court to arrive at what was the actual meaning expressed in the contract, and that to this end, and for this limited purpose, testimony of surrounding circumstances may be given. But, while thus enunciating the true principle of law, it opened the door to the introduction of any and all kinds of evidence, notwithstanding the writing between the parties, in the further declaration, "I think I had better hear this whole story, with all its possibilities and probabilities." Following its ruling admitting all of this evidence, the trial court further embodied its conclusions upon the effect of this evidence in findings such as this: "That at the time of entering into the original contract, the defendant, by its officers and agents, represented to said plaintiff that a Lillie evaporator was possessed of certain characteristics which made it a specially valuable machine, among others, to wit, that said style of evaporator could be operated with exhaust steam; that there was and would be practically no entrainment from such a machine; that it was automatic in operation, and that it did not require the use of oil to prevent entrainment. . . . That the said apparatus furnished by defendant did not possess the qualities and characteristics as repre-

sented by said defendant at the time of entering into the agreement, in that the said apparatus was not automatic in operation; nor could said apparatus be operated with exhaust steam, and said apparatus in operation entrained very heavily, and further required the use of an immense quantity of oil to partially control said entrainment; and said apparatus at no time evaporated three hundred gallons of water per hour, but failed very largely to accomplish the work required thereof, and plaintiff in operating said machine fully observed and conformed to the conditions specified in said contract of June 20, 1900."

By its rulings and by these findings it is apparent that the court adopted the theory of the plaintiff,—namely, that the representations made by defendant "at the time of the entering into the original contract" constituted warranties upon which plaintiff was entitled to rely. In recognition of the indisputable rule that where the oral negotiations of the parties have ended in a complete written contract, that contract is conclusively presumed to express the full meaning of the parties and may not be modified by any antecedent representations whatsoever, plaintiff has these rulings and findings rest for support, not as did the trial court, upon the representations made "at the time of entering into the original contract," but, as has been above stated, upon what it contends to have been the warranties implied by the use in the written contract of the trade name "Lillie triple-effect evaporator." And, in the same connection, plaintiff also calls to its aid the implied warranties declared in sections 1767, 1769, 1770, and 1771 of the Civil Code. Upon the first proposition, that the mere use of a trade name will carry with it, under the circumstances here indicated, the warranties contended for, we are referred to no authority, and the rule is quite the contrary. Under certain circumstances the seller of personal property does, with his sale, extend the warranties of the sections of the Civil Code above referred to, and which in this connection will hereafter be considered. But the general principle of law, well settled, is that where a complete written contract is made, oral representations or warranties, and implied warranties, and all oral negotiations are merged in the written contract, and by its terms the parties must be bound. (Civ. Code, sec. 1625; Mechem on Sales, 1254; 30 Am. & Eng. Ency. of Law, 135;

Johnson v. Powers, 65 Cal. 179, [3 Pac. 625]; *First Nat. Bank v. Hughes*, (Cal.) 46 Pac. 272; *Farkas v. Monk*, 119 Ga. 515, [46 S. E. 670]; *McCormick Harvester Machine Co. v. Yocman*, 26 Ind. App. 415, [59 N. E. 1069]; *Millett v. Marston*, 62 Me. 477; *Bullard v. Brewer*, 118 Ga. 918, [45 S. E. 711]; *Naumberg v. Young*, 44 N. J. L. 331, [43 Am. Rep. 380]; *Conant v. The National State Bank of Terra Haute*, 121 Ind. 323, [22 N. E. 250]; *Union Selling Co. v. Jones*, 128 Fed. 672, [63 C. C. A. 224]; *Seitz v. Brewers' Refrigerating Machine Co.*, 141 U. S. 510, [12 Sup. Ct. 46].)

But if, for the purpose of explaining the phrase "Lillie triple-effect evaporator" resort may be had to the circumstances surrounding the making of the contract, still less tenable does respondent's position become. Those circumstances disclose, in accordance with the testimony of the plaintiff's manager, that "We (plaintiff) wanted an opportunity of demonstrating whether it would be advisable or consistent with our processes to use a concentrator of any character or of any type, and I asked him (Mr. Lillie) whether he would send me one of his apparatuses on trial." Plaintiff desired to experiment, not alone to learn whether the machine was suitable, but whether, if suitable, it was desirable or advantageous to employ it in their manufacturing process. Ninety days was considered long enough for the experiment. It was reasonable that they should pay in case they decided not to accept the machine, since upon its return it would be second-hand and of less value. Defendant agreed to furnish plaintiff with a designated type of machine of its own manufacture, precisely as, in the Seitz case above cited, the refrigerating company agreed in writing to supply Seitz with a machine of its own manufacture designated as "No. 2 size refrigerating machine." The very fact that plaintiff was allowed the ninety days' time for experiment negatives the idea that defendant was warranting, or was called upon to warrant, or was expected to warrant the machine in any other than the one particular—that it would concentrate the tannin solutions by evaporating therefrom three hundred gallons per hour. It is not until near the expiration of the ninety days that plaintiff makes complaint of the unsatisfactory working of the machine, and then only of its inability because of its small size, to evaporate the three hundred gallons per hour. Mention in one of the let-

ters of plaintiff is made of the fact that the machine requires an excessive amount of oil to prevent entrainment, though this statement is coupled with the further one that "on this score we are not disposed to raise serious objection." Moreover, it is shown that at and previous to the time when plaintiff finally declared to defendant the unsuitableness of the machine, it was desiring to purchase a larger machine of the same Lillie type with the capacity of evaporating a thousand gallons per hour. So that, as well from the surrounding circumstances as from the letter of the law applied to this contract, it is clear that no warranty was extended by defendant other than that expressed as to the condensing capacity of the plant.

Nor can we perceive that respondent's position is bettered by the invocation of the sections of the Civil Code which are called to its aid. Section 1767 is to the effect merely that one who sells personal property, knowing that the buyer relies upon his advice or judgment, warrants to the buyer that the seller does not know the existence of any fact concerning the thing sold which would to his knowledge destroy the buyer's inducement to buy. No pleading and no evidence touch this section of the code. Section 1769 is to the effect that the seller of an article of his own manufacture warrants it free from any latent defects not disclosed to the buyer. Nothing in the pleadings or proof touches this section. Section 1770 is to the effect that one who manufactures an article under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose. The pleadings are silent as to this, but, moreover, this was not such a sale as is contemplated by section 1770, but was a lease of the apparatus for experimental purposes, with an option to return at the expiration of ninety days under any circumstances, and with the privilege of completing the purchase upon designated terms if, after experiment, plaintiff should be satisfied to retain it. And that the machine in question was reasonably fit for the purpose is shown from the evidence of plaintiff itself, where it insisted upon its right to continue the use of the machine until another was installed. Section 1771 is to the effect that one who sells or agrees to sell merchandise inaccessible to the examination of the buyer, thereby warrants it sound and merchantable, a provision which, by no possibility, can be held applicable in the case at bar.

It follows from the foregoing that the court erred in admitting the evidence referred to, and still further erred by permitting the evidence so introduced to vary the express terms of a complete and unambiguous written contract.

But while this was error, it was not such error, under the facts here presented, as to necessitate a reversal of the judgment and a new trial. For the complaint sufficiently and explicitly charged on a breach of warranty and the court explicitly found in accordance with the allegation of the complaint. True, the evidence is conflicting; that on behalf of appellant establishing that the machine successfully evaporated in excess of three hundred gallons an hour in the tests made by its agent before the supplemental contract of June 14, 1901, was entered into, and that again in 1902, while the machine was still being used in plaintiff's business, it was once more tested by the agent of defendant and shown to fulfill the requirements of the warranty. But, upon the other hand, the evidence on behalf of plaintiff, which the court adopts in its finding, was that, while strictly conforming to the directions given by defendant for the use of the machine, it was incapable of doing the work warranted. This finding, then, of a breach of warranty is sufficient to sustain the judgment if plaintiff's offer of rescission was timely made. Upon this latter matter it is to be borne in mind that plaintiff's right of rescission was entirely independent of its contractual right to return the machine. The latter it could do within the stipulated time, regardless of any breach of warranty and without assigning any reason whatsoever for such return, paying merely for the use of the machine as contemplated by the contract. But the offer to rescind, which existed entirely independent of this right to return, could be founded only upon a substantial breach of the contract, which the court found to exist, and upon a timely offer to restore. It may not be said, under all the evidence in the case, that the offer of plaintiff in this regard was not timely. Plaintiff's testimony shows that it was diligently endeavoring to bring the machine up to the standard of efficiency warranted and the time which it consumed in this, though approximating ninety days from June 14th, does not lay it open to the charge of an unreasonable delay. True, much argument is advanced by appellant upon the conflicting evidence in the case, to the

general effect that plaintiff was not sincere either in its offer to rescind or in its mode of rescission, but that it was endeavoring merely to obtain a larger type of defendant's machine at an unconscionable advantage. But this, after all, is but an argument addressed to the weight of the evidence, which, in view of the adverse finding of the court, may not here be considered.

For the foregoing reasons the order and judgment appealed from are affirmed.

Lorigan, J., and McFarland, J., concurred.

Hearing in Bank denied.

[S. F. No. 4670. Department Two.—June 22, 1908.]

GEORGE McCOWEN and HALE McCOWEN, Respondents,
v. J. W. PEW, Appellant.

CONTRACTS WITH RAILROAD COMPANY—VIOLATIONS OF PUBLIC POLICY.—

Contracts by a railroad company with individuals to preclude itself from establishing or locating depots and stations on it, at any other than certain localities, or within certain prescribed limits, and contracts with individuals or officers or agents assuming to have influence with the railroad company, agreeing for a consideration to secure the location of stations or depots in a particular locality, or secure the building of its road by a particular route, are void, as being in violation of public policy.

ID.—VALID CONTRACTS—OTHER ROUTES OR STATIONS NOT EXCLUDED—

INDUCEMENT FOR PARTICULAR ROUTE.—A railroad company has the right to select any particular route for the location of its road; and contracts, where the consideration moves directly from the individual to the railroad company as an inducement to the construction of its line between certain points, and contracts for the establishment of depots or stations at particular points on the route selected, where there is no provision or stipulation that the route selected, or depot, or station to be established, is to be located or established to the exclusion of other routes and locations, are valid, and enforceable.

ID.—SPECIFIC PERFORMANCE—CONTRACT WITH OWNERS OF TIMBER-

LANDS.—Specific performance may be decreed of a contract by the owners of timber lands along one of four routes contemplated by

a railroad company for the construction of its proposed railroad conferring upon it an option to purchase their timber-lands at their fair cash value, as an inducement to locate its road over a particular proposed route, which would benefit their other lands and also would benefit the railroad company in the matter of freight, in the absence of any showing that the route selected was injurious to the public.

ID.—PRESUMPTION IN FAVOR OF VALIDITY OF CONTRACT—ERROR OF COURT.—It was error for the court to hold that such contract for the sale of timber-lands to secure the location of a particular route was void *per se*, as against public policy. A contract should not be declared in contravention of public policy, unless it affirmatively appears to be so. Public policy supports contracts made in inducement to the building of a railroad, between certain points, in the absence of a showing that they were made in disregard of the public convenience, and in violation of the clear wants and necessities of the people.

APPEAL from a judgment of the Superior Court of Mendocino County, and from an order denying a new trial. J. Q. White, Judge.

The facts are stated in the opinion of the court.

Jesse W. Lilienthal, and J. E. Pemberton, for Appellant.

McNab & Hirsch, D. M. Delmas, and Henry C. McPike, for Respondents.

LORIGAN, J.—This case was here before (*McCowen v. Pew*, 147 Cal. 299, [81 Pac. 958]) and was remanded for a new trial because an incorrect rule of law was applied by the trial court for the measurement of damages.

The action was brought in the superior court of Mendocino County. The complaint alleged that plaintiffs were the owners of about eleven hundred and sixty acres of land in said county and on October 16, 1899, entered into an agreement with the defendant, J. W. Pew (which agreement is set forth in the complaint), whereby an option was given to the latter to dispose of said property to others, or to purchase said property himself, within one year from the date of the option, at the price of fifteen dollars per acre; that said Pew had not exercised his right under the option within the year given, but still asserted and claimed some rights thereunder. The prayer was for a decree adjudging the agreement to be void

and as of no validity and quieting the title of plaintiffs to the property.

The defendant Pew filed an answer; also an amended cross-complaint, which was answered by plaintiff. In the amended cross-complaint he alleged the making of the agreement, as set forth in the complaint, granting to him an exclusive option for twelve months to acquire said property from plaintiffs, and then proceeds to further allege:

"IV. That in the making of said agreement this defendant was not acting in his own interest and behalf, but for others associated with him, who were to construct the railroad hereinafter mentioned, and as to the interest of said persons, although made and taken solely in the name of this defendant, as party of the second part.

"V. That at the time said agreement and contract was made, this defendant, and the persons so associated with him, were contemplating and preparing for the building of a railroad from some point on the line of the railway of the San Francisco & North Pacific Railway Company into some portion of Mendocino County, in which timber and wood could be procured in large quantities; that at said time four different locations (or routes) for said proposed railroad were under consideration by them, and it had been determined by them to so build said railroad at some one of the said contemplated locations only, but it had not been decided at which one; that one of the said contemplated locations for said proposed railroad was from Ukiah, northerly to Willits in said county; that the building of said railroad at last-mentioned location would greatly increase the value of the lands hereinbefore described by making the timber thereon accessible to a market; but the building thereof at any one of the other proposed and contemplated locations would not increase the value of these lands; that the selection of a route or location depended largely upon securing options upon timber-lands along the line of the proposed railway; that all these facts were well known at the time to plaintiffs, and that the inducements and consideration moving the plaintiffs, and causing them to enter into said contract or agreement was the encouragement and inducement of the building of said railroad from Ukiah to Willits in preference over said other routes.

"VI. That thereupon and thereafter this defendant, and the persons so associated with him, secured the selection of said route and location for said railroad from Ukiah to Willits in preference to said other routes and locations; and said railroad was thereupon surveyed and laid out and is now in process of construction and being rapidly built and pushed toward completion, and will be built from Ukiah to Willits within a short time; and that the consideration and inducement causing preference to be given to said location thereof was the option given in said contract hereinbefore set forth, giving this defendant the privilege of purchasing said land, and similar options in similar contracts regarding other lands adjacent thereto and in that portion of the county, and said options were all taken and said contracts all entered into solely for the purpose of securing freight for said railroad, and the added valuation that would be given to said lands by the construction of the railroad in excess of the price set in said contracts respectively."

Then follows allegations in the amended cross-complaint addressed to the subject of damages with which we are not concerned on this appeal, followed by a prayer for a specific performance of the agreement to convey.

The pleadings thus stood when the cause came on again for trial, after being remanded as heretofore stated, and the trial court directed that the issues raised by the cross-complaint and answer be first tried. When the cross-complainant proceeded to put in his evidence in support thereof, counsel for plaintiffs objected to the introduction of any evidence in support of it on the ground that the cross-complaint did not state facts sufficient to constitute a cause of action or defense to the action of plaintiffs. The court sustained the objection, dismissed the cross-complaint and entered judgment in favor of plaintiffs quieting their title as prayed for in their complaint. From this judgment and an order denying their motion for a new trial the cross-complainant Pew appeals, and the only question necessary for consideration is the refusal of the trial court to permit the introduction of any evidence by appellant in support of his cross-complaint.

While the particular ground upon which the trial court based its ruling in that respect is not disclosed by the general objection of respondents interposed upon the offer of appel-

lant on the trial, or from the ruling of the court upon it, it, however, appears from the exhaustive discussion in the briefs on both sides here, that the special point made was that from the allegations of the cross-complaint it appeared, that the contract sought under that pleading to be specifically enforced was contrary to public policy and void, and hence, specific performance of it could not be decreed.

The allegations of the cross-complaint upon which this contention was based are those which we have heretofore specially quoted, and particularly those alleging that at the time the agreement granting an option was entered into several routes from some point on the line of the San Francisco and North Pacific Railroad Company into some portion of Mendocino County were in view, including one from Ukiah to Willits; that the inducements and consideration moving from plaintiffs and causing them to enter into said agreement granting an option to cross-complainant was the encouragement and inducement of the building of the said railroad between the last-mentioned points in preference over said other routes; that having procured the option from plaintiffs, defendant and his associates secured the selection of the route of the railroad from Ukiah to Willits in preference to other locations and that the consideration and inducement causing preference to be given to said location was the option given in said contract heretofore set forth granting the appellant the privilege of purchasing said land, together with similar options and similar contracts regarding other lands adjacent thereto and in that portion of the county of Mendocino.

To agreements made under such circumstances, and upon such considerations and inducements as these allegations show the agreement relative to this option to have been made, it is insisted by respondents that the rule must be applied that railroad companies are *quasi*-public corporations, in the location of whose lines the public has an interest; that it is the paramount duty of such companies to establish their lines with routes through localities where the wants and necessities of the public shall be best subserved; that the policy of the law is that such companies shall be left to a free and unlimited exercise of their discretion in locating such lines in the interest of public necessities and conveniences; that contracts between a landowner and a company for the estab-

lishment of the line of road to subserve and promote the private and pecuniary advantages of those entering into them, are in contravention of such policy and void, because the tendency of all such contracts is to sacrifice the public interest to the selfish private advantage of the contracting parties.

We make no question about the rule as contended for by respondents, but we are satisfied, taking the allegations of the cross-complaint with the other pleadings in the case, which must be considered for that purpose (although it was on the allegations of the cross-complaint alone that the point of invalidity was based) that it does not appear therefrom that in the granting of the option any restriction or limitation was imposed thereby on Pew and his associates, who contemplated building the railroad, as to the selection of a route, or that the agreement was entered into for the private advantages of the contracting parties, or in disregard of the public interests.

As far as the contracting parties are concerned, while not particularly material to a consideration of the proposition involved, it may be said that it was alleged in the cross-complaint that the price of fifteen dollars an acre for the land in question "was reasonably fair and just," and this is admitted in the answer to the cross-complaint to be true. As to the allegations concerning the consideration and inducement to the granting of the option, it is quite apparent that they were made by the cross-complainant as a foundation for a claim for special damages for the cutting of the timber during the life of the option, and for no other purpose (*McCowen v. Pew*, 147 Cal. 299, [81 Pac. 958]), while the answer to the cross-complaint denies that any such consideration entered at all. But while we mention these matters it must, of course, be conceded that the validity of the contract is not to be determined from their consideration. Even if, as between the parties, this contract was fair and the allegations of the cross-complaint appeared to have been made for a purpose aside from raising any question as to the validity of the consideration for it, yet, for whatever purpose said allegations were made, if it appears therefrom that the consideration and inducement for the agreement were such as are contrary to public morality and public policy, it is the duty of the court to annul the contract for that reason "whenever and wherever

it might appear in the cause," even though no objection to its enforcement on that ground was raised by either party to it. (*Kreamer v. Earl*, 91 Cal. 112, [27 Pac. 735]; *Morrill v. Nightingale*, 93 Cal. 452, [27 Am. St. Rep. 207, 28 Pac. 1068]; *Oscanyan v. Arms Co.*, 103 U. S. 267.)

Now to a consideration of the allegations of the cross-complaint, to determine whether in the making of the agreement for the option any rule of public policy was infringed. Preliminary to a consideration of these allegations it is to be observed, however, that the agreement itself granting the option (the terms of which we have not heretofore particularly referred to), provides for an option in favor of respondent Pew to purchase the eleven hundred and sixty acres of timber land at fifteen dollars an acre, and recites that the owners (McCowens) "desired to dispose of same and to have the assistance of said party of the second part (Pew) in so doing without cost to the parties of the first part" and declares the consideration for the option to be "for value received, . . . and to induce said party of the second part to undertake the disposition of said land." On the part of Pew he stipulated "to use his best endeavors to dispose of said property, either by acquiring same or selling same to others" without cost to the McCowens. These are the only provisions of the contract of option itself. There is nothing therein relative to any conditions or stipulations or restrictions as to any route for a contemplated railroad, nor any mention made of a railroad at all.

Neither when we come to an examination of the allegations of the cross-complaint do we find anything from which it appears that any agreement was made that in consideration of the granting of the option the selection of any particular route was provided for. As we understand and construe these allegations it appears therefrom that Pew and his associates contemplated constructing a railroad through some portion of Mendocino County; that various routes were in contemplation, but no particular one had been decided on when the option in question was obtained; that with a knowledge that said road was to be built on some route the option was given by the McCowens as an inducement and encouragement towards the building of the railroad over a route from Ukiah to Willits; that defendant Pew and his associates subsequently

secured the selection of said railroad route between these points in preference to other routes and locations; that the option so given, together with similar options and similar contracts regarding other lands adjacent thereto was the consideration and inducement causing preference to the building of the route between Ukiah and Willits, and the said options were all taken, and said contract entered into, solely for the purpose of securing freight for said railroad and the added valuation which would be given to said lands in excess of the price stated in said contract by the construction of said road.

It will be observed that there is nowhere in these allegations any statement that Pew and his associates agreed to select any particular route to the exclusion of any other route, nor, in fact, as far as said allegations are concerned does it appear therefrom that they undertook to do anything. Neither is it alleged that the route which was selected was materially, or at all, injurious to the public interests, or that any other route would have better subserved any public want or necessity. All that appears is that Pew and his associates, for the purpose of securing freight for the railroad they contemplated building, took options upon timber-lands in the locality through which the line of said road might be built and such freight received; that certain owners of land, as an inducement to the building of the railroad over one of the four contemplated routes, gave an option upon their lands at a price specified in the option representing the full value of the land and that the only advantage to be secured to the builders of the road (as full value for the land was to be paid) was the obtaining of freight to be carried. A contract made under these circumstances and upon the consideration and inducement disclosed by the cross-complaint is, we are satisfied, when tested by the decisions in violation of no rule of public policy.

In the absence of anything to the contrary in the allegations of the cross-complaint it must be taken that Pew and his associates were persons contemplating the formation of a railroad corporation, and that the options obtained by Pew were for the benefit of such corporation, and that any inducements operating upon the granting of such options must be taken to have been extended to the contemplated railroad itself.

Contracts or agreements between railroad companies and individuals, or between individuals and officers of the company, where one of the particular parties has contracted to secure certain advantages from railroad corporations as to the location of routes of road between designated points, and for the establishment of depots and stations in certain localities, have in numerous cases been before the courts for determination as to their validity. These agreements that we have referred to resolve themselves into three classes, and the rules to be extracted from the decisions dealing with them are first, that in all cases where a railroad company agrees with an individual to preclude itself from establishing or locating depots or stations on its road at any other than certain localities, or within certain prescribed limits, such agreements are void. Contracts of this kind are plainly in violation of a clear duty owed by the railroad company to the public, as public agents, to locate their depots and stations where the public wants and necessities demand their establishment, and to change them and provide others as future public necessities may require. Any attempted limitations or restrictions on the part of the railroad company as to the exercise of such public duty is subversive of the public interests and void. (*Williamson v. Railroad*, 53 Iowa, 126, [36 Am. Rep. 206, 4 N. W. 870]; *St. Louis etc. R. R. Co. v. Mathers*, 104 Ill. 257; *St. Joseph etc. R. R. Co. v. Ryan*, 11 Kan. 602, [15 Am. Rep. 357]; *McClure v. Missouri River R. R. Co.*, 9 Kan. 373.)

The second class relates to agreements where some individual or officer or agent of the railroad company, under an assumption of influence with that corporation, has agreed for a consideration to secure from the corporation the location of stations or depots in a particular locality, or to secure the building of its road by a particular route. Such contracts are uniformly held to be void. They constitute a species of bribery of the officers of the company and are necessarily corrupt in their tendencies as influencing the officers of the corporation for mercenary considerations and for their private emolument to forego the duties they owe to public interests to locate such public conveniences where public necessities require that they should be established. Some of the cases declaring the invalidity of this class of agreements are *Fuller v. Dame*, 18 Pick. 472; *Bestor v. Wathen*, 60 Ill. 138; *Holladay*

v. *Patterson*, 5 Or. 177, and others to which we shall later more particularly refer.

The last class of cases are those involving contracts such as the one under consideration here, where the consideration is to move directly from the individual to the railroad company as an inducement to the construction of its lines between certain points, or analogous cases involving contracts providing for the establishment of depots or stations at particular points on the railroad, but where there is no provision or stipulation in the agreement that the route selected or depot or station to be established, is to be located or established to the exclusion of other routes and locations.

It is to be observed that there is no law which requires a railroad corporation to select any particular route for the construction of a contemplated road. It is to be assumed that the corporation will build through that particular territory where the public necessities require its construction and where its material benefit will be best advanced. But there is no law which requires it to do so. In this state any three persons may incorporate to construct a railroad and may select such route as they choose to build over, notwithstanding a different route might be more to the public interest. In the absence of any law requiring a particular route to be selected, it is necessarily left to the judgment of the corporation to do the selecting, and vested with such discretion, in making a selection between different routes, we do not understand the rule to be that the company for a consideration moving directly to itself and as an inducement thereto, may not determine as between contesting localities in favor of one locality as against the others, or that such an agreement is *per se* illegal and void.

Necessarily, the position of respondents is that the agreement in question here is *per se* void. This is what they do claim, and could not claim otherwise, because there is nothing in the allegations of the cross-complaint that the route selected was not the most advantageous to public interests. They insist, however, that it was not necessary for it to so appear; that any contract whereby a railroad is induced to make a particular selection in consideration thereof is of itself invalid. If this position were correct, it would naturally and logically follow that every contract whereby property was to be con-

veyed, or money contributed by another as an inducement to the building of a railroad over a particular route, whether it appeared that the public interest would be affected or not, would be void, and it would further follow that no authorities could be found sustaining such a contract. To the contrary, however, the great weight of authority, and the prevailing doctrine is, that such agreements of themselves are not void; that they do not contravene any rule of public policy and are enforceable.

Now, as to the authorities sustaining such contracts and the cases upon which respondents rely for their invalidity. And first as to the authorities supporting this contract.

In *Greenhood on Public Policy*, pp. 321, 322, it is said: "The manner in which the majority of the railroads of the country have been built is, in all probability, familiar to every one. Men in subscribing to railroads do so out of self-interest. The conditions imposed are made with reference to the enhancement of the value of their own property, or to their personal convenience . . . It cannot be said that a subscription to a railroad corporation, conditioned on the location of its route in a particular section or direction, has any tendency to influence the corporation to disregard the public convenience; for it goes to a place to obtain traffic, and no public policy requires it to select the dearest route it may find. If it does prejudice the public, it is a matter of easy proof. And if such proof can be furnished any contract of subscription will fall. But in the absence of such proof, *prima facie* any subscription to a railroad corporation conditional upon its building its line in a particular route or through a particular town or country is valid. The contrary view has been sustained by a small but respectable minority. The majority hold that, having fulfilled the condition, the corporations have the right to insist upon the agreement."

In *Piper v. Choctaw Northern Townsite and Imp. Co.*, 16 Okla. 436, [85 Pac. 965], it is said: "This case squarely presents the proposition as to whether or not a railroad company for the purpose of aiding in the construction of its line of road, may accept and enforce an obligation payable to it, conditioned upon the construction of its line of road to a given point within a given time, and the establishment and maintenance of a depot there. There are many respectable authori-

ties which affirm this proposition, and in the judgment of this court it is nearer in consonance with sound reasoning in this case to hold that under the facts presented, the contract is not void, and therefore is enforceable. If the law were otherwise, it would be equivalent to a declaration that a community desiring the advantages of a line of railway, where chartered privileges permit its construction, would be, under the law, prevented and prohibited from inducing such construction by aiding the same. A railroad company is only a *quasi*-public corporation, and, as such it must not only take into consideration the public welfare, but the private welfare of its stockholders as well, in the location and construction of its line of road. A donation to its assets which enables it to build a contemplated line immediately, and a consideration in part of its immediate construction, or which enables it to build its line upon a route that it might not otherwise be able to build, could not be held to be void upon the ground of public policy; and in this respect it must be held to be the privilege of a railroad company in determining its duty towards the public and its shareholders, to determine what line and between what points its line shall be constructed."

In *Baltimore etc. R. Co. v. Ralston*, 41 Ohio St. 575, the court declares on this same point: "That public policy forbids the enforcement of contracts to induce the location of railroad lines at particular places in disregard of the rights of stockholders and the public is very true. Contracts for location, providing private emolument for the officials who sanction them, are of course void. And even if the stipulated location turn out to be the best that could have been made, and entail no detriment to stockholders or the public, yet such contracts are held in well-considered cases, and, we think, correctly, to be against public policy as a dangerous exercise of official power for private gain.

"In the case at bar these objectionable features are not present. The stipulated compensation was for the company alone. And it may well be that it was a matter of indifference to the stockholders and public whether the route was through Defiance or not. The propriety of the location in respect to particular points when the charter is silent is of necessity left to the managing officers of the company, and we fail to see any illegality or immorality in their stipulating for the benefit

of the company in awarding the advantages of location as between contesting localities. The general doctrine that such an agreement is not void *per se* as against public policy is laid down in the leading case of *Cumberland Valley R. Co. v. Baab*, 9 Watts, 458, [36 Am. Dec. 132], and has been frequently recognized in analogous cases in our supreme court, notably in the decisions sustaining contracts to take stock conditioned on a particular location."

In 23 Am. & Eng. Ency. of Law, p. 688, the same general doctrine is announced that, "contracts for the location of railroad lines at particular places are not void *per se* as against public policy, but they are illegal where calculated to prejudice the interest of the public or of the shareholders of the road, or where they provide for private emoluments to the officers of the road who are intrusted with the duty of choosing its location."

These citations sufficiently declare the prevailing doctrine which finds support in numerous authorities, among others, *Cumberland R. Co. v. Baab*, 9 Watts, (Pa.) 458, [36 Am. Dec. 132]; *McClure v. Missouri River etc. R. Co.*, 9 Kan. 373; *Workman v. Campbell*, 46 Mo. 305; *Telford v. Chicago etc. R. Co.*, 172 Ill. 559, [50 N. E. 105]; *Louisville etc. Co. v. Sumner*, 106 Ind. 55, [5 N. E. 404, 55 Am. Rep. 719]; *Racine Bank v. Ayres*, 12 Wis. 512; *Berryman v. Cincinnati Southern R. Co.*, 77 Ky. 755; *Texas and St. Louis R. R. Co. v. Robards*, 60 Tex. 545, [48 Am. Rep. 268]; *Harris v. Roberts*, 12 Neb. 631, [41 Am. Rep. 779, 12 N. W. 89]; *Cedar Rapids First Nat. Bank v. Hendrie*, 49 Iowa, 402, [31 Am. Rep. 153]; *Supervisors v. Wisconsin Cent. R. Co.*, 121 Mass. 460; *Lyman v. Sub. R. Co.*, 190 Ill. 320, [60 N. E. 515]; Elliott on R. R., 3d ed., secs. 121-386; *Missouri Pacific R. R. Co. v. Tygard*, 84 Mo. 263, [54 Am. Rep. 97].

Some of these authorities cited relate to the validity of contracts providing for the transfer of property, or the contribution of money, to railroads as a consideration or inducement to the building of their line of road over certain routes or between designated points. Others relate to similar contracts inducing the establishment of depots or stations in particular localities. In principle there can be no distinction between such contracts as to the objects sought, whether they pertain to lines of road or the location of depots or stations.

The proposition in all these cases decided is, that in the absence of any agreement that the route selected, or the stations located, shall be to the exclusion of other routes or stations, they are not contrary to public policy, and that the rule applies equally to both classes of contracts.

Now, to examine the authorities cited by counsel for respondents in support of their contention as to the invalidity of the contract, and we shall refer only to those from which they have quoted excerpts in their briefs. We make no question as to the correctness of the principles announced in almost all those cases, but, in our judgment, the facts in each case to which they were applied were radically different from those in the case at bar.

Recurring to these cases. In *Reed v. Johnson*, 27 Wash. 42, [67 Pac. 381], the evidence disclosed that certain officers of the Northern Pacific Railroad Company in consideration that they should receive a portion of the proceeds of plaintiff's land, agreed to so locate the line of said road that it would run through a certain section of land and further agreed to locate a depot within the section; that the company had contemplated building its line by another route but by reason of the inducement above stated the officers having in charge the location of the line and depots determined to change the route and locate both the line and depot upon said land. In the next case relied on, *Bestor v. Wathen*, 60 Ill. 138, the railroad company made a contract with a certain construction company to build its road. While building, the construction company, the president of the railroad company, one of its directors, and its construction agent entered into a contract with the owner of one hundred and sixty acres of land, situated where the road then in process of construction was expected to cross the Illinois Central Railroad, by the terms of which the owners agreed to sell the first-named parties an interest in the land. The only consideration was that the so-called purchasers should "aid, assist and help in building the road upon said land." The court refused to enforce either of these contracts. In both these cases the contracts were between an individual and certain officers of the railroad company who were taking advantage of their position as agents of the railroad company to contract for their individual benefit. It is apparent from the opinions in both these cases

that the railroad company had nothing to do with these contracts and had no interest in them; that they were made for the private and personal benefit of certain officers of the company in the one case, and certain officers and the contracting company in the other. They were without the knowledge of the company and in violation of the duties of the contracting parties to them. It is obvious that the court did not there have under consideration contracts made with the railroad company itself or for its benefit, but those made by certain of its agents and officers with outsiders, looking to the personal advantages of said officials alone. Such contracts were clearly a fraud upon the corporation and its stockholders whom the officers and agents represented. These contracts fell within the second class of cases, to which we have heretofore referred, and which are universally condemned as fraudulent upon the rights of the corporation and void.

In *Woodstock Iron Co. v. Extension Co.*, 129 U. S. 643, [9 Sup. Ct. 402], a railroad company contracted with another company of like nature to construct a railroad by the nearest and cheapest route from Atlanta to Columbus for a consideration of twenty thousand dollars a mile. One of the directors of the extension company and also a director in the railroad company negotiated on behalf of the extension company a contract with an iron company to deflect the road at a certain point lengthening it about five miles, for which the iron company agreed to give a right of way through its property and convey certain tracts of land and pay certain sums of money. The railroad company had no knowledge of the contract, and the court held the contract void as immoral in its conception and corrupting in its tendency; that it was nothing less than a bribe offered to the employee to disregard his contract with his employer. Of course, such a contract would be indefensible, but the contract at bar is in no manner similar to it.

Fuller v. Dame, 18 Pick. 472, is also cited as supporting the contention of respondents. But there the company, however, had no knowledge of the contract or any interest in it. Its existence was not even known to it or its officers. All that was held in that case was that a contract made by a stockholder of a company with a property owner to use his influence with the company for the establishment of a depot in a

particular locality was a fraud upon the other stockholders and upon the company and void as against public policy. It will be observed that this case also falls within the second class of cases we have heretofore mentioned.

A case also relied on is *Enid Right of Way and Township Co. v. Lile*, 15 Okla. 328, [82 Pac. 811]. This case, if its apparent force was not destroyed by the language used in a subsequent decision by the same court, tends, more than any other cited by respondents, to sustain their contention. In the *Enid Right of Way* case the affirmation of the judgment was by an equally divided court. An exhaustive dissenting opinion was filed, in which an analysis of all the cases supporting the prevailing opinion was made, and they were differentiated from the case under consideration by the court, and the conclusion reached by the judges dissenting, upon a review of all the authorities bearing on the question, that the weight of authority was in favor of the validity of the contract there in question, but which the prevailing opinion discountenanced as contrary to public policy. In that case the action was upon a promissory note given by defendant Lile to the plaintiff, which was stipulated to be paid when the Denver, Enid & Gulf Railroad was completed to a point where the location of a depot on certain land was to be made. The note was held void as contrary to public policy. It is unnecessary to discuss the grounds upon which the court reached this conclusion, because, while the apparent effect of this decision is in favor of the position of respondents, this same court in a subsequent decision appears to have limited its application to contracts between third parties, looking to the exercise by them of influence with the railroad company to do something which was against public policy, because, in *Piper v. Choctaw Northern Township and Imp. Co.*, 16 Okla. 436, [85 Pac. 965], which we have heretofore quoted from, it is expressly held in conformity to the prevailing doctrine that a subscription moving directly to the railroad company to encourage the building of its railroad at a particular place, contravened no rule of public policy and was enforceable. In that opinion the *Enid* case, as also *McGuffin v. Coyle*, 16 Okla. 648, [85 Pac. 954, 86 Pac. 962], decided by the same court and relied on also by respondents are specially referred to and held not to militate against the general rule.

We have referred, we think, to all the cases quoted from by respondents in support of their position, and are satisfied that none of them have any application in support of the point they make.

While all these cases reviewed had relation to contracts concerning the establishment of depots or stations, the principle to be applied in determining their validity is no different from that which is to be applied with reference to contracts regarding the construction of a road between given points. This, of course, is conceded by counsel in citing them. It will be observed further, that in all the cases reviewed, the contracts in question were declared invalid because agents or officers of the companies had taken advantage of their position to further their private interests and secure personal emoluments to the disadvantage of the companies they represented. The contracts were not declared invalid because they related to the location of depots or stations (speaking now of the special matters involved in the contracts in those cases) at particular localities, but because the persons who made them had been guilty of fraud and corrupt conduct toward their principals—the corporations. None of the cases involved a contract between an individual and the company itself, or those contemplating the construction of the road, providing for the payment of money or property as an inducement to its construction over a particular route, the making of which, under the prevailing doctrine as we have shown countervails no rule of public policy.

The error of the trial court was in holding as it necessarily did, that *per se* this contract was void as against such policy. A contract should not be declared in contravention of public policy unless it is apparent that it contravenes some public statute, or is against good morals, or that its tendency is to interfere with the public welfare or safety. Nothing of this character appears from the allegations of the cross-complaint. Contracts for the conveyance of property, or the payment of money, in consideration of the building of a railroad within a given time and between certain points, as our court (*Spires v. Urbahn*, 124 Cal. 110, [56 Pac. 794]) says have become familiar as stimulants to the construction of such railroads and other public works. It is familiar history that the great railroads of the west have been largely aided in their con-

struction by contributions and donations made in inducement to the selection of certain routes. States, counties, and cities have granted subsidies to them to that end and the national government in the building of the first transcontinental railroads donated vast tracts of land as inducements to the building of such roads over the continent and between particular points. Our statute (Civ. Code, sec. 465) provides for the acquirement by a railroad company of grants and donations of real and other property which may be made to aid and encourage the construction, maintenance, and accommodation of such railroad. We refer to these matters as indicating the public policy which supports contracts which are made in inducement to the building of railroads and that no contract which simply provides for the transfer of property or the payment of money, or confers upon the company the right to acquire either as an inducement to build its road between certain points, should for that reason alone be held in contravention of any public policy.

The most that has been held by any of the cases, and those supporting the prevailing doctrine appear to so hold, is that it may be interposed as a defense to the enforcement of such contracts, that they were made in disregard of public convenience and in violation of the clear wants and necessities of the people. Of course, in the present case no such showing is made. The trial court based its conclusion that the contract for the option was invalid from the allegations of the cross-complaint, which does not pretend to disclose anywhere that any public convenience or necessity was subverted by the contract. The court held, as a matter of law, that a contract giving an option to purchase certain lands as an inducement to the building of a line of railroad between certain points was void upon its face—or void *per se*. The courts, however, as we have seen, declare expressly to the contrary, and that such a contract, in the absence of any showing that public interest has suffered in its making, is valid and enforceable. The trial court was therefore in error in refusing to permit the offer of evidence on the part of appellant in support of the allegations of his cross-complaint, and in dismissing his action praying for specific performance of the contract.

In disposing of this appeal we have not overlooked the objection of respondents that the appeal from the order deny-

ing appellant's motion for a new trial cannot be considered because his notice of intention to move for a new trial was not served in time. We have examined the record and find no merit in the point.

The judgment and order are reversed and the cause remanded for a new trial.

Henshaw, J., and McFarland, J., concurred.

Hearing in Bank denied.

[S. F. No. 4978. In Bank.—June 24, 1908.]

ANGLO-CALIFORNIAN BANK, LIMITED, Plaintiff, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, and HON. J. V. COFFEY, one of the Judges thereof, Defendants.

WRIT OF REVIEW—ORDER DIRECTING PAYMENT TO RECEIVER OF INSOLVENT BANK—FINAL ADJUDICATION—REMEDY BY APPEAL.—A writ of review will not lie to annul an order directing the payment of money by the plaintiff to a receiver of an insolvent bank, notwithstanding the claims of third parties to part of the funds who had been allowed to intervene, where the order, however erroneous, was in effect a final adjudication of the rights of all parties, an appeal from which will afford the petitioner for the writ an adequate remedy.

ID.—APPEALABLE ORDER IN EXCESS OF JURISDICTION.—An appealable order, even if in excess of jurisdiction cannot be reviewed in *certiorari* proceedings.

APPLICATION for Writ of Review to an order of the Superior Court of the City and County of San Francisco. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

Jesse W. Lilienthal, for Petitioner.

E. De Los Magee and J. V. De Laveaga, for Respondents.
CLIII Cal.—48

ANGELLOTTI, J.—Upon the petition of plaintiff filed in this court, a writ of review was issued commanding defendants to certify to this court, in order that the same might be reviewed, a transcript of the record and proceedings culminating in an order of said superior court requiring plaintiff to pay to Edward J. Le Breton, as receiver of the California Safe Deposit & Trust Company, an insolvent corporation, \$47,637.55 held by it as the agent of said insolvent at the time of the adjudication of insolvency. The claim of plaintiff was that such order was in excess of the jurisdiction of the court and, therefore, void. Defendants duly certified to this court a transcript of such record and proceedings, and the matter has been submitted for decision.

It appears from the record that in a proceeding instituted in said superior court under the Bank Commission Act, by the people of the state of California by the attorney-general against said California Safe Deposit & Trust Company and its directors, judgment was given on January 14, 1908, decreeing said corporation insolvent, ordering it into involuntary liquidation and appointing Edward J. Le Breton as receiver thereof to take possession of all its property and to do all things necessary in the liquidation of its affairs. Plaintiff, a banking corporation, was at such time an agent of the insolvent corporation for certain purposes, and as such agent had in its possession \$94,469.23, carried on its books to the credit of said insolvent. The receiver having demanded an accounting of plaintiff as to the money in its possession belonging or credited to the insolvent, plaintiff on January 22, 1908, rendered an account showing the above facts. On January 24, 1908, plaintiff notified the receiver that it had received written notice from the partnership firm of Stewart & McKee that said firm claimed that \$3,349.77 of said sum was its own property and was not the property of the insolvent, and that plaintiff must not pay the same or any part thereof to the receiver. On the same day, it also notified the receiver of the receipt of a similar notice from the Western Pacific Railway Company as to \$44,287.78. Solely because of said claims by said third parties, and not claiming any beneficial interest on its own part, plaintiff refused to pay to the receiver any part of either of the said amounts, and paid only the balance of said \$94,469.23—viz. \$46,831.68. These facts having been

brought to the knowledge of the superior court by written petition by the receiver, said court made its order to show cause directed to plaintiff, neither of said third persons being made parties thereto, requiring it to show cause on February 26, 1908, why an order should not be made requiring the payment by plaintiff to the receiver of said amounts. On February 25, 1908, said firm of Stewart & McKee filed their petition in intervention in the proceeding pending in said superior court, setting up the facts upon which it based its claim to the \$3,349.77, and asking for an order decreeing the same to be its property and directing the receiver to direct plaintiff to pay the same to it, or directing plaintiff to make such payment. The court on the same day made its order allowing said Stewart & McKee to file said petition and intervene in the matter. By order of the court, a citation was thereupon issued to the receiver and plaintiff requiring them to show cause on March 18, 1908, why said petition should not be granted. Before the date so fixed—viz. on March 3, 1908, the court, after a hearing on the order to show cause based on the receiver's petition, made its order requiring plaintiff to forthwith pay said amount, together with the \$44,287.78 claimed by the Western Pacific Railway Company, to the receiver. This is the order which plaintiff seeks to have annulled in this proceeding.

We can see no good answer to the claim made by defendants in their brief to the effect that plaintiff had the right to appeal from the order complained of, and that, therefore, the writ of review was improperly issued. It is, of course, not disputed that if a party has the right of appeal from an order made in excess of jurisdiction, he cannot have such order reviewed in *certiorari* proceedings. Such is the express provision of our statute (Code Civ. Proc., sec. 1068), and it has been uniformly so held by this court. That an order of the character of the one under consideration is generally appealable by one affected thereby who is a party to the record is practically conceded by learned counsel for plaintiff, and it must be under the decisions of this court. The theory upon which the decisions sustain such right of appeal by such a party from such an order is that the order is in effect a final judgment against him in a collateral proceeding growing out of the action—is so far independent of the suit itself as to

be substantially a final decree for the purposes of an appeal, although there has been no final decree in the suit. (See *Grant v. Superior Court*, 106 Cal. 324, [39 Pac. 604]; *Grant v. Los Angeles etc. Ry. Co.*, 116 Cal. 71, [47 Pac. 872]; *Los Angeles v. Los Angeles etc. Co.*, 134 Cal. 121, [66 Pac. 198].) Plaintiff's position on the merits is that by reason of the claim made against it by the third parties as to this money, it cannot safely pay the same to the receiver except in pursuance of some judgment or order made in a proceeding to which such claimants are parties, and that it is entitled either to retain the money until such controversy is determined, or to pay the money into a court having jurisdiction thereof, to abide such determination. The order in question is a final adjudication against plaintiff upon these matters. Its effect, if valid, is to require plaintiff to forthwith pay such money to the receiver, and finally deprive it of possession thereof without securing it against the claims of such third parties. It is clearly within the class of orders referred to in the cases last cited. Plaintiff was, of course, a party to the record, so far as such collateral proceeding was concerned, having been brought in as such a party by the order to show cause, and is fully within the rule of *Elliott v. Superior Court*, 144 Cal. 506, [103 Am. St. Rep. 102, 77 Pac. 1109], in regard to parties entitled to appeal.

It is claimed, however, that this order is not now appealable, because there has been no final determination on the petition of Stewart & McKee as to \$3,349.77 of said money, filed by leave of the court and which had not been heard at the time of the making of the order. The rule invoked is the one applied in *Nolan v. Smith*, 137 Cal. 360, [70 Pac. 166], to the effect that a judgment is not a final judgment within the meaning of section 939 of the Code of Civil Procedure relative to appeals, unless it be one which finally disposes of the rights of all the parties to the action in relation to the matter in controversy, and thus, in effect, ends the proceeding in the court in which it is entered. Assuming in aid of plaintiff that the intervention of Stewart & McKee was made in the collateral proceeding instituted by the receiver for the obtaining of the possession of the money from plaintiff, rather than in the main proceeding pending in the superior court, the rule invoked has no application here. The order

did finally determine the rights of all the parties, including such interveners, in relation to the matter in controversy. It was such a disposition of the whole subject-matter of the controversy as to completely dispose of the petition of the interveners, and deny them the relief sought thereby. The mere fact that it was made before the day set for a hearing on the intervener's petition and without any such hearing, however erroneous such a course may have been, does not change the situation. The whole controversy was regarding the present disposition of the money in the possession of plaintiff. The receiver claims that it should be forthwith delivered to him by plaintiff, the interveners claim that \$3,349.77 thereof should be paid to them by plaintiff and sought an order requiring such payment, and the plaintiff claimed that it should not be required to deliver up the money to the receiver in the face of the adverse claim made by the interveners, until the question of ownership had been determined. The order made purported to dispose of this whole controversy by decreeing immediate payment by plaintiff of the whole amount to the receiver, and, in effect, ended in the superior court the particular proceeding under consideration. We are satisfied that it must be held to be an adjudication of the subject-matter of the controversy as to all of the parties thereto.

It follows from what we have said that the writ of review was improperly issued.

The writ is discharged and the proceeding dismissed.

Sloss, J., Shaw, J., Henshaw, J., and Lorigan, J., concurred.

Rehearing denied.

[S. F. No. 3540. Department Two.—June 25, 1908.]

A. C. DAUPHINY, Appellant, v. A. H. BUHNE, Respondent.

LIBEL—FALSE CHARGE OF OFFICIAL CORRUPTION AGAINST CANDIDATE FOR RE-ELECTION—PRIVILEGED COMMUNICATION NO DEFENSE.—The publication of a false charge against a candidate for re-election to office, that while in office he was guilty of official corruption, in soliciting and accepting personal benefits as a consideration to influence his official acts, as a member of a city council, is libelous

per se; and there is no privileged communication under the code, or general law, which will exempt the defendant publishing such charge, from responsibility for falsehood.

ID.—TRUTH OF CHARGE THE ONLY JUSTIFICATION.—A libel is no more justifiable when published against a candidate for public office, than if published of him on any other occasion. Though the publication of the truth is justifiable; yet the publication of a falsehood finds no justification whatever under the law. The law does not permit the character of those seeking position to be destroyed under any guise of privileged publication. One can justify the publication of a libel against a candidate for public office upon privilege, only by proof that the accusation is true.

ID.—ERROR IN INSTRUCTIONS—PRIVILEGE—LIBELOUS CHARGE.—It was error to instruct the jury that the publication was privileged, where there was no evidence to sustain it, but the facts and circumstances connected with the publication negatived the existence of such privilege. The question being one of law, it was the court's duty, if requested, to instruct the jury that the publication was not privileged. The court also erred in refusing to instruct the jury that the article set forth in the complaint was libelous upon its face.

ID.—FAILURE TO PROVE PLEA OF JUSTIFICATION—AGGRAVATION.—The court also erred in refusing to instruct the jury that where the defendant reiterates the alleged libelous charges in his answer, and offers no evidence to prove their truth, if the jury were satisfied that it is made with a knowledge of its falsity and maliciously, and not in good faith, such plea of justification is an aggravation of the wrong done to the plaintiff, and may be considered by the jury in assessing damages.

ID.—QUESTION OF DAMAGES—WANT OF MALICE—ERRONEOUS INSTRUCTION.—There is responsibility for actual and substantial damages for loss of reputation, etc., even where there is no actual malice. What the responsibility should be is a question for the jury under instruction explicitly declaring the rule under which it should be ascertained. It was error to instruct the jury, that "if an honest mistake is made in an honest attempt to enlighten the public it must reduce the damages to a minimum, if the fault itself is not serious, and there should be no reasonable responsibility where there is no malice."

ID.—ERRORS IN EVIDENCE—DUTY OF APPELLANT—ABSENCE OF REFERENCE TO TRANSCRIPT.—It is the duty of counsel for appellant properly to index the transcript, and to point out therein the rulings of the court objected to in the admissibility of evidence, upon which he relies as erroneous; and where he fails to enlighten the court in his argument, as to where the alleged errors may be found, it will be assumed that they were not deemed of sufficient importance to undertake the task; and this court will not assume the burden of doing it.

APPEAL from a judgment of the Superior Court of Humboldt County and from an order denying a new trial. E. W. Wilson, Judge.

The facts are stated in the opinion of the court.

A. W. Hill for Appellant.

Henry L. Ford, L. M. Burnell, and A. J. Monroe, for Respondent.

LORIGAN, J.—This is an action for libel. In the early part of 1901 plaintiff was a member of the firm of A. C. Dauphiny & Company, doing a general merchandise business in the city of Eureka, and both he and defendant were members of the common council of said city. At that time there was presented to the council petitions by various railroad companies for franchises to operate their roads across the city front of the city. Among these petitioning companies was the California & Northern Railroad Company. Diverse views were held by members of the council as to the terms and conditions upon which these several franchises should be granted, plaintiff opposing for a long time the granting of the franchise to the California & Northern Railroad Company, defendant favoring it. Ultimately this franchise was passed, plaintiff and defendant both voting in favor of it, and it developed from the evidence on the trial that it was concerning the action of plaintiff relative to the passage of the ordinance granting this franchise that the article published by defendant of plaintiff had reference. Subsequently, and in the month of June, 1901, plaintiff and defendant were both candidates for re-election as councilmen from their respective wards in the city of Eureka. They were not opposing candidates, but each openly opposed the re-election of the other. It was during this period that the defendant caused to be published in the daily Humboldt *Standard*, a newspaper published in the city of Eureka, an article entitled: "From Councilman Buhne of the First Ward," signed in the same way and containing the following: "Now, Mr. Dauphiny . . . did you have the city's interest at heart when, after fighting a certain franchise, you went to the company seeking it, or its representatives,

and told them that if they would buy groceries from you, you would vote for the franchise? I know you did this and can prove it, and you voted for the franchise." Plaintiff thereupon brought this action for damages grounded upon the portion of the article just quoted, which was set forth in the complaint, accompanied by proper allegations that it was intended by defendant, and understood by the citizens who read the article, to charge that plaintiff had violated his official oath and been guilty of official corruption; that he had solicited personal benefits and had dishonestly accepted them for the purpose of influencing his official action as a member of the council of the city, and had corruptly bartered and legislated away the rights and privileges of said city; with the further allegation that said article so published was false and malicious.

Defendant answered, admitting the publication, and as a first defense averred that it was true, and, as a second defense: "That at the time the defendant published the alleged defamatory article in the daily *Humbolt Standard*, to wit; on June 15th, 1901, the said plaintiff was the member of the city council from the fourth ward, and this defendant was the member of said city council from the first ward of said city of Eureka. That at the said time, to wit, June 15th, 1901, both plaintiff and defendant were candidates for the same offices, to wit, as members of the city council of the city of Eureka to be elected at the general election which was held in the said city of Eureka on or about the 16th of June, 1901.

"That defendant wrote and published said article, without malice, of and concerning the character and motives of a candidate for a public office, and for the promotion of public interests and public welfare; that this defendant and all other people, citizens and electors of said city of Eureka, were interested in the character and motives of all candidates for public offices and public trusts, which said candidates were seeking at the hands of said electors."

The case was tried and a verdict rendered by the jury in favor of the defendant, and from the judgment entered thereon, and from an order denying his motion for a new trial, plaintiff appeals.

It is insisted on this appeal that the evidence was insufficient to warrant the verdict against plaintiff and that a new

trial should have been granted by the lower court on that ground; also, that the court erred in refusing instructions asked by appellant, and in giving some requested by the respondent.

As a new trial must be had for error as to instructions, it is unnecessary to embarrass future consideration of the case by discussing the sufficiency of the evidence. Different or other evidence may be presented upon the new trial which must be ordered.

It will be observed that two defenses were interposed by defendant: 1. A justification on the ground that the charge as published was true; 2. That the article published by him, under the circumstances alleged, constituted a privileged publication under section 47 of the Civil Code, which relieved him from responsibility to plaintiff.

As the jury, while satisfied that the charge published was untrue, might yet have found it to be privileged under the instructions of the court and based their verdict upon that ground, it becomes important to consider the instructions as to the law on that subject.

Section 47 of the Civil Code, relating to privileged publications, declares that, "A privileged publication is one made— . . . 3. In a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive of the communication innocent, or who is requested by the person interested to give the information."

The defense of privilege which the defendant pleaded and under the evidence introduced by him sought to sustain, was made and offered with a view of bringing the publication within the operation of subdivision 3 of said section.

As to the evidence, it was conceded that the plaintiff was a candidate for councilman when this publication was made, and the defendant testified in his own behalf that he entertained no malice against the plaintiff when he caused the charge to be published; that he published the article, as he said, with the intention of stating things concerning plaintiff which he believed to be true and because he believed the public generally should know what kind of a man the plaintiff was.

This was the only evidence upon which the claim of privilege was based. The theory of defendant, both under his pleading and this evidence, was that because the plaintiff was a candidate for public office, he had a right, as a member of the community, to call the attention of the public to the character and motives of plaintiff as such candidate; that these were matters in which the public had a direct interest; that under these circumstances, as long as the publication was made without actual malice, and in a belief that the charges were true, it was a privileged publication under the subdivision of the section referred to, even though, in fact, the charge was false.

The trial court accepted this theory and claim of the defendant, and upon the assumption that there was evidence which would support a finding by a jury that the publication was privileged, instructed them upon the law as to that subject. The court read to the jury that particular portion of the section of the Civil Code which we have quoted, and having done so immediately proceeded further to instruct as follows:—

“I therefore instruct you that if you find from the evidence in this cause that the alleged publication was made by the defendant without malice, upon a matter in which he was interested to a person or persons who was or were also interested therein or who being interested therein requested him to give such information, then I instruct you that such communication to such person or persons was and is a privileged communication. If you find such to be the fact, then such communication forms no basis for an action, and you will find a verdict for the defendant, unless you can also say that the defendant, in making the publication, was actuated by malicious motives independent of the mere publication of the article in question.”

It was error to give this instruction because there was no evidence in the case at all warranting it. All the evidence relied on by the defendant in support of his claim that the publication was privileged had no tendency to support it. There was no evidence under which this instruction was applicable.

It is not the law that a person may assail the character of a candidate for office by charging him with criminal mis-

conduct and then escape liability on the ground that the charge was made with good intentions and for justifiable ends without malice, and, under even an honest belief that the charge is true, and that the occasion of his candidacy called for its publication. While the privilege of electors to comment and criticise the acts and conduct of candidates for public places is very large, this privilege must be confined to statements of the truth. There is no privilege of publication under the code, or general law, which will exempt one from responsibility for falsehood. The only justification one can make who publishes criminal accusations against a candidate is, when he is called to account, to prove the truth of the accusation. Libel is no more justifiable when published about a candidate for public office than if published of him on any other occasion. His reputation and character are as much entitled to protection against false accusation when he is a candidate for office as at any other time. It is true that when a person becomes a candidate for a public office his talents and qualifications for the office to which he aspires may be freely commented on and criticised by any member of the community by publication or otherwise. His faults or his vices, in so far as they may affect his official character, may be freely discussed. He does not, however, by becoming a candidate surrender his private character as a subject for false accusation. That character is only put in issue as far as his fitness or qualification for the office he seeks may be affected by it. The public have an interest in knowing the truth about those who occupy or seek public office, but it has no interest in having falsehoods concerning them disseminated. Hence, publication of the truth, with an honest intention of giving information to the public of a candidate, furnishes no ground for complaint. But it is one thing to publish the truth and quite another to publish falsehoods; the publication of the truth is justifiable, but the publication of a falsehood finds no justification whatever under the law. While facts may be published, falsehoods may not, and he who would justify a charge of specific acts of misconduct against a candidate for office must do so by proof of the truth of the charge or he does not justify at all. The law does not permit the character of those seeking position to be destroyed by libelous charges under any guise

of privileged publication. One can justify the publication of a libel against a candidate for office upon privilege, only by proof that the accusation is true. This is the rule unqualifiedly laid down by this court in *Jarman v. Rea*, 137 Cal. 339, [70 Pac. 216], where the subject will be found fully discussed.

It may be said too, while considering this instruction, that had the plaintiff requested it, it would have been the duty of the court to have instructed the jury that the publication made by the defendant, under the circumstances disclosed by the evidence, was not privileged. When the facts and circumstances under which an alleged defamatory publication is made are undisputed, it is a question of law for the court to determine whether it was privileged or not. In the case at bar, the facts and circumstances under which the alleged libelous publication was made, were not disputed. They showed that the publication was not privileged, and had the court been requested, it should have so instructed the jury. (*Carpenter v. Ashley*, 148 Cal. 422, [83 Pac. 444].) The fact, however, that no such instruction was asked, did not make it any the less error to give the jury an instruction on the theory that there was evidence upon which they might find the publication was privileged when in fact there was not.

It is also insisted by appellant that the court erred in refusing to instruct the jury, as requested by him, that the article set forth in the complaint was libelous on its face. This point is well taken, as the court should have given that instruction. The article charged the plaintiff with official corruption; with dishonestly agreeing to accept personal benefits as a consideration to influence his official acts upon the matter which was before the legislative body of the city of Eureka of which he was a member. A charge against a public official importing want of integrity or corruption in the discharge of his official duties is actionable of itself. (*Schomberg v. Walker*, 132 Cal. 224, [64 Pac. 290]; *Jarman v. Rea*, 137 Cal. 339, [70 Pac. 216].)

The court should have likewise given another instruction asked by plaintiff, but which was refused. This instruction was to the effect that where a defendant reiterates the alleged libelous charges in his answer and offers no evidence to prove their truth, and the jury are satisfied that it is made with a

knowledge of its falsity and maliciously and not in good faith, such plea of justification is an aggravation of the wrong done to the plaintiff and may be considered by the jury in assessing damages. This instruction was correct and should have been given. (*Chamberlain v. Vance*, 51 Cal. 75; *Westerfield v. Scripps*, 119 Cal. 611, [51 Pac. 958].)

It is further insisted by appellant that one of the instructions given at the request of respondent was erroneous. In that instruction, the court told the jury that: "The public are interested in knowing the character of candidates for office; and while no man can willfully destroy the reputation of a candidate by falsehood, yet, if an honest mistake is made in an honest attempt to enlighten the public it must reduce the damages to a minimum if the fault itself is not serious, and there should be no reasonable responsibility where there is no malice."

This instruction was undoubtedly taken from language used by the court in *Baily v. Kalamazoo Publishing Co.*, 40 Mich. 251, 257, where the court was discussing the right to criticise the conduct of a candidate for office and the responsibility therefor. At least, we find the language used there, although inaccurately copied in the instruction as to the latter part of it. In that case the words used are: "there should be no unreasonable responsibility where there is not *actual* malice," instead of "no reasonable responsibility where there is no malice" as the instruction has it. It is always injudicious to take the language of a court in discussing a proposition of law as correct instruction to be given to a jury. General language is often there used which would be inappropriate as an instruction, and this instruction is an illustration of it. The particularly objectionable part of the instruction is found in the use of the language "it must reduce the damages to a minimum." It is not the province of a trial court to say to a jury "if an honest mistake is made in an honest attempt to enlighten the public, it must reduce the damages to a minimum." This does not at all follow. Minimum as applied to damages means the least possible amount that may be awarded by a jury, but under the circumstances such as the court referred to in its instruction, the jury might award much more than the minimum as actual damages. This is too clear for comment. Of course, as to the rest of the in-

struction which was incorrectly copied, it is hardly worth discussing it, on account of the emasculated condition in which it was given. There could be, however, no necessity or propriety in giving it if it had been correctly copied. What the responsibility should be is a question purely for the jury, to be determined by them under instructions explicitly declaring the rule under which it should be ascertained. There is responsibility for substantive damages—damages for loss of reputation and so forth—even where there is no actual malice in the mind of the accuser when he makes the defamatory charge. There is no necessity on a new trial for giving this instruction at all, even if modified by omitting the objectionable features we have pointed out. As it stood, it only had application to the matter of mitigation of damages, and the rule in that respect, as laid down in other instructions, seems to be full enough, or, at least, is not challenged by appellant as being incorrect in law.

Some alleged errors in rulings upon the admissibility of evidence are claimed to have been committed by the court. The transcript embodies a bill of exceptions containing all the evidence set out by question and answer, and is quite lengthy. But the transcript itself does not contain any index of where the testimony of any witness may be found. Neither in the briefs of counsel for appellant is it indicated where, nor in what part of the bill, the questions objected to, and the rulings of the court upon them, may be discovered. He contents himself with setting forth in a page or so in his brief a lot of questions which he claims the court erred in overruling his objections to. We are not even enlightened on the subject as to whether the questions were answered or not. It is the duty of counsel to point out specifically where alleged errors, upon which they rely, may be found in the transcript, and if counsel do not see fit to do so, it will be assumed that they have not deemed them of sufficient merit or importance to undertake the task. In any event, under such circumstances, this court will not assume the burden of doing it.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

Henshaw, J., and McFarland, J., concurred.

[Crim. No. 1441. In Bank.—June 25, 1908.]

Ex Parte C. D. GREENALL, on Habeas Corpus.

PHYSICIANS—PRACTICE WITHOUT CERTIFICATE—CONSTRUCTION OF PENAL STATUTE.—In order to bring any person within the penal provisions of the act of March 14, 1907, making it a misdemeanor for any person to practice or attempt to practice, or advertise or hold himself out as practicing medicine or surgery or osteopathy, or any other system or mode of treating the sick or afflicted in this state, without having at the time of so doing a valid unrevoked certificate as provided in the act, it must appear that he is engaged in the line of work specified as a business, or holding himself out as being so engaged.

ID.—INSUFFICIENT COMPLAINT IN JUSTICE'S COURT—HABEAS CORPUS.—

A complaint in a justice's court charging a misdemeanor, under said act, which does not show the facts required to constitute a medical practice thereunder, but the allegations of which are entirely consistent with the innocence of the defendant, cannot support a conviction, and the defendant will be discharged upon *habeas corpus*.

APPLICATION for Writ of Habeas Corpus to the Sheriff of Los Angeles County to test the validity of a conviction in the Justice's Court of Los Angeles Township. E. E. Selph, Justice of the Peace.

The facts are stated in the opinion of the court.

Philaetha S. Michelsen, and Gavin W. Craig, for Petitioner.

J. D. Fredericks, and Grant R. Bennett, for Respondent.

William C. Tait, for Board of Medical Examiners, of Counsel, for Respondent.

ANGELLOTTI, J.—The petitioner was convicted in the justice's court of Los Angeles township of the county of Los Angeles on a complaint charging that he did, on or about the eighteenth day of June, 1907, "willfully and unlawfully treat the sick or afflicted by practicing the system or mode known as chiropractic without having at the time of so practicing a valid, unrevoked certificate from the board of medical examiners of the state of California entitling him so to do, as provided by an act of the legislature of the state of California

entitled 'An act for the regulation of the practice of medicine and surgery, osteopathy, and other systems or modes of treating the sick or afflicted, in the state of California, and for the appointment of a board of medical examiners in the matter of said regulation,' approved March 14, 1907," (Stats. 1907, p. 252.) The judgment pronounced on said conviction was affirmed on appeal by the superior court of said county. Having been delivered into the custody of the sheriff of said county under such judgment, he sought to be discharged by this court on *habeas corpus*, and a writ having been issued he was released on bail pending a determination of this proceeding.

It is contended that the complaint in the justice's court did not state facts constituting a public offense. We are of the opinion that this contention must be held to be well founded. The act of March 14, 1907, provides that "Any person who shall practice or attempt to practice or advertise or hold himself out as practicing medicine or surgery, osteopathy, or any other system or mode of treating the sick or afflicted, in this state, without having, at the time of so doing, a valid, unrevoked certificate, as provided in this act, shall be guilty of a misdemeanor." The act nowhere states, as did the act of 1901 (Stats. 1901, p. 56), which was limited to a regulation of the practice of "medicine and surgery," what is meant by the term "practice" as used therein. The act of 1901, after providing that "Any person practicing medicine or surgery" without a license shall be deemed guilty of a misdemeanor, provided in section 16: "The following persons shall be deemed as practicing medicine or surgery within the meaning of this act: 1. Those who profess to be, or hold themselves out as being, engaged as doctors, physicians or surgeons in the treatment of disease, injury or deformity of human beings. 2. Those who, for pecuniary or valuable consideration, shall prescribe medicine, magnetism or electricity in the treatment of disease, injury or deformity of human beings. 3. Those who, for pecuniary or valuable consideration, shall employ surgical or medical means or appliances for the treatment of disease, injury or deformity of human beings. . . . 4. Those who, for a pecuniary or valuable consideration, prescribe or use any drug or medicine, appliance, or medical or surgical treatment, or perform any operation for the relief or cure

of any bodily injury or disease." There was thus given by that act to the term "practicing medicine or surgery" a definite meaning, corresponding substantially with the popular understanding of the term. When we say that one is practicing medicine or surgery or osteopathy, we ordinarily mean that he is engaged in that line of work as a business, holding himself out as being so engaged, or for a consideration treating those who will accept his professional services, and we would not apply the term to one who incidentally and gratuitously suggests or puts into operation some method of treatment in the case of one who is "sick or afflicted." We are satisfied that the term "practice" in the act of 1907 should not be given any broader meaning than it had in the act of 1901. One who within this meaning "practices" medicine or surgery or osteopathy, or any other recognized mode of treatment of the sick, without a certificate, violates the provisions of the act. It might be sufficient in the complaint to charge simply that one had practiced medicine, or osteopathy, or chiropractics, without such certificate. In such an allegation, the word "practice" would, in view of the accepted meaning it is given when used in such connection, naturally and reasonably bear no other construction than the one we have described, and so construed would show an offense. But the complaint in the case before us, as we read it, contains no such allegation. The allegation was simply that the defendant did willfully and unlawfully "treat the sick or afflicted" without having at the time a valid unrevoked certificate as required by the act, the words "by practicing the system or mode known as chiropractic" being simply descriptive of the method by which he treated the sick. As thus used, the word "practicing" cannot reasonably be given the meaning we have described, but is synonymous with the word "using." We are informed in the briefs that the word "chiropractic" means a treatment somewhat analogous to that of osteopathy, the removal of the cause of disease without the use of drugs or any other means except the adjustment of the vertebra of the spine by manipulating them with the hand. If this be correct, the complaint simply charges that the defendant used this method in "*treating*" the sick or afflicted, without having any certificate under the act, and the allegations of the complaint would be fully sustained by proof that he

had incidentally and gratuitously attempted to administer aid to one who was sick or afflicted by use of this method. It might as well be contended that a complaint simply charging that one treated a sick person by administering medicine, without having a certificate, would state a public offense under this act. To bring a person within the provisions of the act, it must appear that he practices, or attempts to practice medicine, etc., as a business or calling, or advertises, or holds himself out as so doing, and, as we have said above, an allegation that one "practiced medicine," or surgery, etc., might show this. As we read the act, the allegations of the complaint in the justice's court in this case are entirely consistent with the innocence of the defendant of any violation of its provisions. It therefore fails to show a public offense.

Counsel for respondent contends that if there is in this state such an offense or crime as that of which petitioner was convicted, the insufficiency of the complaint is immaterial on *habeas corpus*, citing *Ex parte Ruef*, 150 Cal. 665, [89 Pac. 605]. The rule of the Ruef case has never been applied by this court to proceedings in courts of inferior, as distinguished from courts of general, jurisdiction. To the contrary, it has been the uniform practice to consider on *habeas corpus* the question of the sufficiency of the complaint in such inferior courts, and to discharge the prisoner where such complaint failed to show a public offense under the laws of the state. This matter was fully considered in *Ex parte Kearny*, 55 Cal. 212, where the distinction between the two classes of courts was stated, and where the prisoner was discharged solely because of the insufficiency of the complaint in this regard. That decision has never been modified. In the Ruef case we were considering the question with relation to a proceeding pending in a court of general jurisdiction, the superior court of the city and county of San Francisco, while here we have a proceeding in a court which has uniformly been treated as an inferior court, a justice's court. (*Ex parte Kearny*, 55 Cal. 212.) It may be that a strong argument can be made in favor of the proposition that there is no logical basis for a distinction in this regard between courts of general jurisdiction and those of inferior jurisdiction, but the distinction has the support of no less an

authority than Chief Justice Marshall in the celebrated case of Tobias Watkins, 3 Pet. (U. S.) 193, and has been constantly adhered to by this court.

In view of our conclusion upon the question of the sufficiency of the complaint it is unnecessary to consider the contention of petitioner that the act of 1907 is unconstitutional.

It is ordered that the petitioner be discharged, and his bail exonerated.

Henshaw, J., Lorigan, J., and Beatty, C. J., concurred.

[S. F. No. 4932. In Bank.—June 26, 1908.]

CHARLES A. WARREN COMPANY, Respondent, v.
ALL PERSONS CLAIMING ANY INTEREST IN, OR
LIEN UPON, THE PROPERTY HEREIN DE-
SCRIBED, OR ANY PART THEREOF, et al., Defend-
ants; SAN FRANCISCO SAVINGS UNION, AND
MERCANTILE TRUST COMPANY OF SAN FRAN-
CISCO, Appellants.

ACTION TO QUIET TITLE UNDER MCENERNEY ACT—GRANTOR OF TRUST-DEED AS SECURITY.—The grantor of a deed of trust intended as security for a loan of money may maintain an action under the provisions of the act of June, 1906, entitled "An act to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records," where the plaintiff's title is decreed subject to the provisions of the deed of trust.

ID.—LEGAL TITLE IN TRUSTEE—ESTATE OF INHERITANCE LEFT IN TRUSTOR.—The legal title under a trust-deed intended as security for a loan passes to the trustees solely for the purpose of enforcing the security according to its terms, but when the debt is paid the legal title becomes vested in the trustor or his successors in interest, and pending the existence of the security, the trustor retains an estate of inheritance, which may pass by devise or descent as against all persons except the trustees and those lawfully claiming under them.

ID.—DEEDS OF TRUST PROVIDED FOR IN STATUTE.—Under section 5 of the act of 1906, the provision that the affidavit shall set forth, among other things, "a statement of any and all subsisting mortgages,

deeds of trust, and other liens," unquestionably has reference to deeds of trust intended as security, and the legislature has thereby manifested its intention that the existence of such deeds of trust should not operate to deprive the trustor of his right to maintain the action.

ID.—POSSESSION REMAINING IN TRUSTOR.—The right to bring the action is limited by section 1 of the act, to any person who is by himself or his tenant or other person in the actual and peaceable possession of the property. The trustor has such possession, under a deed of trust, which conveys no right of possession to the trustee; and the trustor may maintain the possession and right of possession of the property, until the execution of the trust, when the trust-deed is silent upon the subject.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

Campbell & Baldwin, for Appellants.

J. C. Bates, for Respondent.

SLOSS, J.—This is an action to quiet title, brought under the provisions of the act of June, 1906, entitled "An act to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records." (Stats. 1906, p. 78.)

The plaintiff, claiming the ownership of a lot of land in the city and county of San Francisco, filed a complaint in the form described in section 2 of the act. Accompanying the complaint, the plaintiff filed an affidavit, as required by section 5 of the act. This affidavit, after setting forth plaintiff's ownership of the land and showing his source of title, together with other matters required to be stated in the affidavit, averred that the land was subject to a lien "for \$15,000 with interest, secured by a deed of trust in favor of San Francisco Savings Union, a corporation."

The San Francisco Savings Union and the Mercantile Trust Company of San Francisco (the trustee named in the deed of trust referred to in the affidavit) appeared, and, treating the complaint and the affidavit in conjunction as constituting a single pleading, demurred for want of facts sufficient to con-

stitute a cause of action and on the ground that plaintiff was not a proper party plaintiff to the action.

Their demurrer being overruled, the defendants answered, denying plaintiff's ownership in fee simple, and alleging that on May 12, 1905, Charles A. Warren, the then owner of the land, and plaintiff's predecessor in interest, had executed and delivered to the Mercantile Trust Company of San Francisco, as trustee, a deed of trust to secure the payment of a promissory note for \$15,000 made by the grantor to the San Francisco Savings Union. It is alleged that the note is unpaid and is still held and owned by said Savings Union, and that the Mercantile Trust Company has never conveyed said real property. The answer prays judgment declaring the Mercantile Trust Company to be the owner of the land subject to the terms of the deed of trust. This instrument, a copy of which is annexed to the answer, is in the usual form of a conveyance to a trustee to secure the payment of an indebtedness.

The court found in favor of the allegations of the complaint and affidavit, and entered its judgment declaring the plaintiff to be the owner in fee simple of the property; adjudging that no person other than plaintiff has any estate, right, title or interest in, or any lien upon said property except that said Mercantile Trust Company of San Francisco holds a deed of trust as security for money loaned as in its answer set forth. It is further adjudged and decreed that all persons other than plaintiff be enjoined from asserting any claim, right, title or interest in or to said property, adverse to the title determined in favor of plaintiff, "except that . . . Mercantile Trust Company of San Francisco has and holds a deed of trust on the lot . . . as set forth in its answer on file in this action to secure the money loaned as evidenced by the promissory note as set forth in its said answer herein."

From this judgment the defendants San Francisco Savings Union and Mercantile Trust Company of San Francisco appeal.

The contention of the appellants is that by the execution of the deed of trust the title in fee vested in the trustee, Mercantile Trust Company of San Francisco, and that so long as such title was held by the trustee, the plaintiff had no such estate or interest as would authorize it to maintain an action

under the provisions of the act in question. In view of the fact that the court below, in declaring the title of plaintiff, expressly made such title subject to the deed of trust, it is difficult to see how the appellants are in any wise prejudiced by the judgment complained of. They assert no interest in the land except that vested in them by the deed of trust, and the judgment does not purport to limit their right to protect that interest as fully as they could if there had been no judgment. But, assuming that the defendants were "parties aggrieved" by the judgment (Code Civ. Proc., sec. 938) and as such entitled to appeal from it, we think the act in question, reasonably construed, does authorize an action by one who has made a conveyance in trust, merely as security for a debt.

Section 1 of the act provides that, in certain cases, "any person who claims an estate of inheritance or for life in, and who is by himself or his tenant or other person holding under him, in the actual and peaceable possession of any real property" may bring the action to establish his title and to determine all adverse claims to the property. It is argued by appellants that inasmuch as, by the provisions of the Civil Code (sec. 863) "every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust" and the "beneficiaries take no estate or interest in the property," the execution of the deed of trust to the Mercantile Trust Company vested the whole estate in such trustee, and there remained in the grantor and his successors no "estate or interest in the property," and, necessarily, no "estate of inheritance or for life." That instruments conveying property as security for a loan, in trust to sell in the event of non-payment, or to reconvey to the grantor upon payment of the debt, create valid express trusts, is thoroughly settled in this state (*Sacramento Bank v. Alcorn*, 121 Cal. 379, [53 Pac. 813]; *Balfour etc. Co. v. Woodworth*, 124 Cal. 169, [56 Pac. 891]; *Staacke v. Bell*, 125 Cal. 309, [57 Pac. 1012]; *Tyler v. Currier*, 147 Cal. 31, [81 Pac. 319].) And that such instruments do not create a mere lien or encumbrance, but vest in the trustee the legal title to the property, has been repeatedly held, and has been reasserted by this court in the very recent case of *Weber v. McCleverty*, 149 Cal. 316, [86 Pac. 706].

It does not follow, however, that no estate can remain in the trustor. Under section 864 of the Civil Code, the author of a trust may prescribe to whom the property shall belong, in the event of the failure or termination of the trust, and may transfer or devise such property, subject to the execution of the trust. By the terms of section 865, his grantee or devisee acquires a *legal estate* in the property, as against all persons except the trustees and those claiming under them. Section 866 provides that every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust or his successors. While, under the code provisions, the beneficiary takes no estate, the creation of the trust may vest an estate in the trustee, and still leave an estate in the trustor. Under an instrument like the one in question, the trustee takes a fee, such estate being necessary for the carrying out of the trust to sell if the debt should not be paid. But since, upon payment of the debt, the property will revert in the trustor or his successors, an interest in the property is left in such trustor. Such interest is an estate, and, as it may pass by devise or descent, is an estate of inheritance. "The legal title is conveyed solely for the purpose of security, leaving in the trustor or his successors a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them." (*MacLeod v. Moran*, ante, p. 97, [94 Pac. 604].)

There are other considerations making it perfectly clear that the party executing an instrument of this character is embraced within the class of those to whom the legislature intended to give the right to institute this action. Section 5 of the act requires the plaintiff to file with the complaint an affidavit, setting forth, among other things, "a statement of any and all subsisting mortgages, deeds of trust, and other liens" on the land. The phrase "deeds of trust" unquestionably has reference to deeds of trust given as security, like the one in the case at bar. While they do not, strictly speaking, constitute "liens" upon the property, the legislature, by so designating them, and requiring a statement of them in the affidavit accompanying the complaint, manifested unmistakably its intention that the existence of such deeds of trust should not operate to deprive the trustor of the right to maintain the action.

The right to bring the action is limited, by section 1 of the act, to any person who is by himself or his tenant, or other person, in the actual and peaceable possession of the property. That the trustor has such possession is clear. The deed of trust "conveys no right of possession and the trustor may remain in possession, and, until the execution of the trust, may maintain an action to recover possession even when the trust-deed is silent upon the subject of possession." (*Sacramento Bank v. Alcorn*, 121 Cal. 379, [53 Pac. 813].)

It follows that the respondent was a proper party plaintiff, and entitled to the relief granted. It may be added that this case presents no question as to the rights of beneficiaries or trustees under any instruments except deeds of trust given as security for indebtedness.

The judgment is affirmed.

Angellotti, J., Henshaw, J., Lorigan, J., and Shaw, J., concurred.

[S. F. No. 4558. In Bank.—June 30, 1908.]

CITY STREET IMPROVEMENT CO., Appellant, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondents.

STREET ASSESSMENT—ENFORCEMENT AGAINST LANDS OF STATE UNIVERSITY NOT USED FOR SCHOOL PURPOSES.—An assessment for a street improvement by which lands held in trust for the state university, which are not in actual use for school purposes, are benefited in value, may be enforced against such lands, the same as against the property of a private owner.

ID.—EFFECT OF EXEMPTION FROM TAXATION.—The exemption of land held by public agents from taxation, applies to general state, county, and municipal taxes, and does not extend to its exemption from a local assessment for a street improvement, enhancing the value, if not actually used for any public purpose. The rule in this state is that such property, when actually devoted to public use, is exempt from assessments under special laws, otherwise not.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Bishop, Wheeler & Hoefler, and Alfred J. Harwood, for Appellant.

J. C. Bates, *Amicus Curiae*, and R. M. Royce, *Amicus Curiae*, also for Appellant.

Charles E. Snook, for Respondents.

HENSHAW, J.—By this action plaintiff sought to enforce a street-assessment lien after performance of his contract upon certain real property situated in the city and county of San Francisco, legal title to which stands in the name of the regents of the University of California. The allegations usual and pertinent to such an action were pleaded, and, in addition thereto, it was alleged that the land upon which it was sought to impose the lien was entirely unimproved, vacant and unoccupied, and was and is held and devoted solely to the private uses of the defendant, and is not incidental to the performance of any public function, nor actually appropriated to any public use whatsoever, and, further, that by the doing of the street work the land was enhanced in value at least to the amount of the assessment, and derived an equal benefit with all other lots of land assessed. A general demurrer was interposed by the defendant, which demurrer was sustained. From the judgment which followed, plaintiff appeals, and there is thus presented the single question whether, under the state of facts set forth in the complaint, the land of the defendant is or is not subject to assessment and liable for the lien following thereon, under the general laws for the improvement of streets.

As to the character, *status*, and powers of the defendant corporation, little more need be said than that it is a private corporation charged with the public trust of the general government and superintendence of the University of California. (Stats. 1867, 1868, p. 252.) This corporation has the power to hold, purchase, and convey such real estate as the purposes of the corporation shall require. It may receive donations from private individuals of moneys or other prop-

erty for the benefit of the university, and it has, under restrictions, the power of distribution of its funds. Its principal source of income is derived from the state by tax levy. One half of the moneys received from this tax must be devoted to the purpose of acquiring lands, buildings, and permanent improvements for the university, while the other moiety is under the general control of the board. (Stats. 1897, p. 44.)

Section 7 of article IX of the constitution declares that the University of California shall constitute a public trust, and its organization and government shall be perpetually continued. Section 1 of article XIII, it is not disputed, exempts the property of the University of California from taxation. But the constitution of the state being but a restriction upon the power of the legislature, the limitations therein contained will not be extended beyond the legitimate meaning and use of the terms employed. There is a broad and well-recognized distinction between a tax levied for the general public good and without special regard to the benefit conferred upon the individual or property subject to the tax, and a special assessment levied to force the payment of a benefit, of value corresponding and equal to the amount of the assessment upon the property. This matter need not be discussed, since it has been elaborately considered and expounded in *San Diego v. Linda Vista Irrigation Dist.*, 108 Cal. 189, [41 Pac. 291]. The opinion in that case quotes from *Hassan v. City of Rochester*, 67 N. Y. 528, as follows: "The collection and enforcement of assessments made for local improvements has never been the subject of general regulation by statute, and there is no provision which exempts the property of the state from liability for such assessments. Not being excepted by the statute law of the state it is left for the legislature, which is vested with ample power for that purpose, to make such enactments on the subject as may be considered needful and proper."

Hamilton on Special Assessments, section 318, summarizes the matter in the following language: "Exemptions made by general laws in favor of such property apply only to the general purposes of government, state, county and municipal, even where the statute exempts the specific property from taxation of every kind, or from being taxed by any

law of the state, and do not apply to the system of special assessments for local improvements."

With this distinction in mind, between a general tax and a special assessment for benefits, no authority has been pointed out to us in the constitution, the statute law, or in the decisions of this court which forbids the application of the street law to land whose title and use are such as here pleaded. The question cannot arise as to this being an effort to subject lands of the state, owned and used in its sovereign capacity, to an assessment lien, since, as declared in *Estate of Royer*, 123 Cal. 614, [56 Pac. 461], the university, while a governmental institution and an instrumentality of the state, is not clothed with the sovereignty of the state, and is not the sovereign. The lands, title to which is in the board of regents, are lands held for the public educational purposes of the state, and their holding and their use do not differ in principle from the lands which may be held by boards of school directors or trustees of school districts. The principle is well established that where any of such lands are not directly and necessarily used for a public purpose they may be subjected to the payment of special assessments for benefits. And this is in consonance with justice and equity. For, to assess certain lot owners upon a street for all the cost of the work, part of which is for the benefit of a public institution, is to enhance the value of the university property at the expense of the few, instead of by taxation upon all the people at the expense of all. So it is said in *Hassan v. City of Rochester*, 67 N. Y. 528: "A different rule would compel individual lot owners to pay assessments levied for improvements which were of benefit to the state lands, without any adequate advantage, and in many instances impose a burden which would be extremely onerous and produce great injustice. This could not have been intended." The limitation upon the powers thus to subject lands held for public purposes to such assessments is indicated by the case of *Mayrhofer v. Board of Education*, 89 Cal. 110, [23 Am. St. Rep. 451, 26 Pac. 646], where an attempt was made to subject a schoolhouse erected by a public-school district to a mechanic's lien. It was there held that the state is not bound by the general words of a statute which will operate to trench upon its sovereign rights, or injuriously affect its capacity to perform its functions. The

principle is that public policy itself will deny and forbid the application of general laws to property so held in trust for public purposes, as public-school buildings, city or county municipal buildings, and the necessary land upon which they stand, because of the grave interference with necessary public functions, governmental or educational, which would thus result. The private right of the individual must give way to the general good of all. But the rule goes no further, and wherever lands, though owned by some public agent or mandatory of the government, school boards, counties or cities, penal or reform institutions, or institutions for the feeble-minded or insane, are not in use in the performance of a public function, such lands, in the absence of a constitutional or legislative restriction (such as we have seen does not exist in this state) are justly compelled to bear their part of the expense which goes directly to increase their values. So it was declared in *San Diego v. Linda Vista Irr. Dist.*, 108 Cal. 189, [41 Pac. 291], where pueblo lands of the city of San Diego had been subjected to and sold under the lien of an irrigation district assessment. And in *Witter v. Mission School District*, 121 Cal. 350, [66 Am. St. Rep. 33, 53 Pac. 905], where an attempt was made to enforce a street assessment against lots used for school purposes, while sustaining a demurrer because of the absence of facts here pleaded,—namely, that the lands were not in use for a public purpose,—after referring to *San Diego v. Linda Vista Irr. Dist.*, 108 Cal. 189, [41 Pac. 291], this court said: "So far as shown the lots in question may have school buildings upon them and may be used and occupied exclusively for school purposes, in which case we do not think this action could be maintained. As a private owner, however, of land not used exclusively for school purposes, but held as an investment or from which to derive rentals, as property of an individual is held and owned, we see no reason why the lands of a school district should not be assessed for improvements the same as those of any other private owner." That these rulings are in accord with the great weight of authority may be seen by reference to *City of Chicago etc. v. City of Chicago*, 207 Ill. 37, [69 N. E. 580]; *State v. Robertson*, 24 N. J. L. 504; *School District v. Board of Improvements*, 65 Ark. 343, [46 S. W. 418]; *Sioux City v. Ind. School District*, 55 Iowa, 150, [7 N. W. 488]; *City of Atlanta v. First Presby-*

terian Church, 86 Ga. 737, [13 S. E. 252]; *Hassan v. City of Rochester*, 67 N. Y. 528; *Sewickley M. E. Church Appeal*, 165 Pa. 475, [30 Atl. 1007]; *Essex County v. City of Salem*, 153 Mass. 141, [26 N. E. 431]. A reading of these cases will disclose that in many of the states, upon the theory that, in the absence of express prohibition, even the state should bear its share of benefits for special assessments, it is held that property, although devoted to public use, is liable to such assessment. The rule in this state is, as above indicated, that such property when actually devoted to the public use is exempt; otherwise not.

The complaint in this action sufficiently pleads facts rendering the land in question liable to the assessment. Its ultimate liability, of course, must depend upon proof of the facts alleged, but the complaint was not obnoxious to demurrer, and the judgment is therefore reversed and the cause remanded, with directions to the trial court to overrule the demurrer and permit defendant to plead to the merits.

Lorigan, J., Sloss, J., McFarland, J., Shaw, J., and Angel-lotti, J., concurred.

[L. A. No. 2048. Department One.—July 1, 1908.]

U. S. OIL AND LAND COMPANY, Respondent, v. KATE
M. BELL et al., Appellants.

ATTORNEY AND CLIENT—GOOD FAITH IN TRANSACTIONS BETWEEN.—In all dealings with his client the highest degree of fairness and good faith is required of an attorney, and the courts view all such transactions with suspicion and examine them with the utmost scrutiny, and if they present even a suggestion of unfair dealing, the burden of proof is on the attorney to show the honesty and good faith of the transaction and that it was entered into by his client freely and voluntarily. Tested by this rule, it is held that the evidence was sufficient to warrant the trial court in concluding that the honesty and good faith of the transaction involved herein had been shown, and that it had been entered into by the defendants freely and voluntarily.

HOMESTEAD—LANDS HELD BY TENANCY IN COMMON.—In this state, land held by tenancy in common or joint tenancy cannot be selected or claimed as a homestead.

EVIDENCE—QUESTIONS ALREADY ANSWERED.—The refusal to permit a witness to answer questions, the subject-matter of which had been covered by her previous testimony, is not error.

ID.—EXCEPTION MUST BE TAKEN TO EXCLUSION OF EVIDENCE—APPEAL.—The ruling of the trial court in excluding testimony of a witness cannot be reviewed on appeal where no exception to the ruling was reserved.

ID.—STRIKING OUT EVIDENCE—GROUNDS FOR STATED IN CONJUNCTIVE.—Where a motion is made to strike out evidence on several grounds stated in the conjunctive, it is not the law that the motion must be denied unless all the objections are well founded.

APPEAL from an order of the Superior Court of Santa Barbara County refusing a new trial. J. W. Taggart, Judge.

The facts are stated in the opinion of the court.

B. F. Thomas, for Appellants.

Richards & Carrier, and James L. Crittenden, for Respondent.

ANGELLOTTI, J.—This is an appeal by defendants from an order denying their motion for a new trial.

On June 12, 1897, defendant Kate M. Bell was the owner of a tract of land in Santa Barbara County containing about ten thousand acres, under a deed from her husband, defendant John S. Bell, which had not been recorded. On that day she and her husband, by deed of conveyance, which was duly recorded June 18, 1897, granted, sold, and conveyed to James L. Crittenden and Sidney M. Van Wyck, Jr., an undivided one half thereof. This deed also purported to convey an undivided one half of another tract containing some four thousand acres, in which concededly defendants had no interest, and which is in no way here involved. Thereafter, on October 30, 1897, Mrs. Bell made and acknowledged her declaration of homestead as to a portion of said ten-thousand-acre tract, containing seventy-five acres, more or less, and such declaration was duly recorded November 1, 1897. On March 7, 1899, said Van Wyck conveyed his interest under the deed aforesaid to James L. Crittenden, and on September 18, 1902, said Crittenden and his wife conveyed said undivided one half of said ten-thousand-acre tract to plaintiff. This action

was brought by plaintiff on October 31, 1902, to obtain a decree adjudging that defendants have no interest in any part of said ten-thousand-acre tract other than that Mrs. Bell has an undivided one half interest therein as tenant in common with plaintiff, that plaintiff is the owner in fee of an undivided one half as tenant in common with Mrs. Bell, and that the declaration of homestead is null and void. On July 14, 1903, the defendants answered, and on the same day Mrs. Bell filed a cross-complaint, the object of which was to obtain a judgment declaring the deed of June 12, 1897, rescinded and annulled on the ground that there was not any adequate or sufficient consideration therefor, and that the same was executed and procured by and through undue influence of the grantees, by an unfair advantage of Mrs. Bell's weakness of mind, taken by the grantees, and by an oppressive and unfair advantage of her necessities and distress taken by said grantees. Plaintiff answered the cross-complaint. The findings of the trial court were full and complete in favor of plaintiff upon the question of the validity of the deed of June 12, 1897. It was found that the deed was made "for a valuable, adequate and sufficient consideration," that they "did freely and voluntarily make, execute and deliver" the same, "that there was no concealment or misstatement or misrepresentation whatever or of any kind upon the part of said Jarrett T. Richards in any of his transactions . . . in the matter of the said deed," that said deed "was not made, executed or delivered under or by reason of or as the result of any undue influence or of any oppressive or unfair advantage taken of the mental distress or financial embarrassment or necessitous condition of the defendants or either of them by said James L. Crittenden, or by said Sidney M. Van Wyck, Jr., or by said Jarrett T. Richards or by Charles F. Carrier or by any one on behalf of them or either of them," "that neither of said defendants was ever or at any time subject to any undue influence exercised by any of said parties, but that said defendants with full knowledge and notice of all the facts acted freely and voluntarily."

If these findings have sufficient support in the evidence, they dispose of the case, and render immaterial other findings in favor of plaintiff upon other matters urged in support of the judgment.

Examination of the record discloses ample support for these findings. The trial court found in accord with the great weight of evidence that in May and June, 1897, and for some time prior and subsequent thereto, the ten-thousand-acre tract was of the value of not exceeding one hundred thousand dollars. It was and for several years had been almost hopelessly involved in litigation, claims being asserted against it to the extent of about one hundred and ten thousand dollars by the executors of the estate of Thomas Bell and the San Francisco Savings Union. The Bell estate claims, aggregating some fifty thousand dollars, had been pending in the courts for several years, being involved in the action of *Bell v. Staacke*, 141 Cal. 186, which was commenced in 1893. The property was in the hands of a receiver, and was yielding no income to defendants. The attorneys for the defendants herein apparently felt that there was practically no hope for success in that case, and that the claims against the property would absorb it all. Under these circumstances it was suggested by Mr. Richards, one of such attorneys, that another attorney might be found who might be able to carry the case to a successful issue. Mr. James L. Crittenden, then of the firm of Crittenden & Van Wyck, was spoken of in this connection, and Mr. Richards went to San Francisco in May, 1897, to consult with him, armed with a power of attorney executed by Mr. and Mrs. Bell, authorizing him to employ an attorney or attorneys and to grant as a contingent fee to the person so employed any interest in the subject of the suit and the real property affected thereby as to him might seem best. Mr. Crittenden finally agreed with Mr. Richards that his firm would take the case for one half of the property, Mr. and Mrs. Bell to pay all costs and expenses. He expressed a desire to have Mr. Richards remain in the case to act with his partner, Mr. Carrier, as local attorneys, and said that he would allow him one third of his fee therefor. He also insisted that an absolute conveyance of the undivided half of the property should be made at once. On May 22, 1897, Richards wrote to Mr. Bell at Santa Barbara, stating that Mr. Crittenden would agree "to fight the thing through for half what can be recovered," and that he had voluntarily agreed to give Richards one third of his half, but that two hundred and fifty dollars must be advanced by the Bells for personal expenses and costs of Mr.

Crittenden in attending the trial. Mrs. Bell read this letter on its receipt. On May 25th Mr. Richards received a telegram from Mr. Bell, of which Mrs. Bell had knowledge, directing him to "close arrangement," and informing him the money was ready. Thereupon the contract of employment was executed by Mr. Richards for Mr. and Mrs. Bell, and by Messrs. Crittenden and Van Wyck, the Bells agreeing therein to forthwith execute and deliver a good and sufficient deed of conveyance of an undivided half of said property. On his return to Santa Barbara from San Francisco, Mr. Richards gave a copy of the agreement to Mr. Bell. Mrs. Bell testified that she never saw the agreement until long after, but there never was any claim on her part that she did not fully understand and intend that Messrs. Crittenden and Van Wyck were to have half of the property for their fee, and that Mr. Richards was interested with Messrs. Crittenden and Van Wyck to the extent already stated. Her claim was that she did not understand that the conveyance was to be made prior to the termination of the litigation, or that the attorneys were to receive one half of the rents and profits of the land received by her pending the litigation, which, of course, would necessarily be the case if they received a deed at once. As we have seen, however, at this time the property was in the hands of a receiver, and there was apparently no likelihood of her ever receiving any of the rents and profits. Early in June, 1897, Mr. Crittenden went to Santa Barbara to engage in the trial of the action. He insisted that the deed should at once be made in accord with the agreement, and Mr. Richards, on the evening of June 11th, left the deed at the Bells' house for examination by her, Mr. Bell having already seen it and being entirely satisfied. On the morning of June 12th he called at the house and saw Mrs. Bell. She undoubtedly for some reason was strongly averse to executing it, and had been worrying a great deal over the matter during the night. The trial court was fully warranted by the evidence in concluding that her only objection was to thus absolutely putting the property in the control of parties who were strangers, before they had rendered the services they had undertaken to perform. He was further fully warranted in concluding that in the interview between her and Mr. Richards the latter was not guilty of the slightest bad faith, or of any misrepresentation or undue influence

whatever, but that he honestly and fully explained the situation to her, and that Mrs. Bell, while deploring the circumstances that made it necessary, executed the deed freely and voluntarily and with full understanding of the situation. Considering the value and situation of the property, there was nothing unreasonable or unfair in the amount of compensation demanded, or in requiring a deed to be made at that time. Up to this time neither Mr. Crittenden nor Mr. Van Wyck had ever seen Mrs. Bell or personally communicated with her. The deed was duly delivered, and Mr. Crittenden proceeded with the performance of the service he had agreed to render. There was never any intimation to him that the arrangement that had been made was not entirely satisfactory to Mrs. Bell, nor has there ever been any complaint that the services of the attorney were not in every respect satisfactory. With the consent of Mrs. Bell, Mr. Van Wyck retired from the case, and Mr. Crittenden continued his services in the litigation in which this land was involved until the end of the year 1903, relying upon his deed, as he had a right to rely, in view of the acceptance of his services by Mrs. Bell and her failure in any way to claim the invalidity of such deed. While he was not ultimately successful in releasing the land from the claims asserted against it, he was successful in prolonging the litigation to such an extent that when those claims could no longer be resisted, the land, as the record indicates, had become much more valuable on account of the discovery of petroleum therein, an advantage accruing not only to him as the owner of an undivided half, but also to his client as the owner of the other half.

We cannot understand how, in the face of substantial evidence of this character, it could be conceived that this court would hold the findings of the trial court to be without sufficient support. It may be assumed that the rule as to transactions between a client and his attorney is fully as rigorous as is claimed by counsel for appellant—that in all dealings with his client the highest degree of fairness and good faith is required of the attorney, and the courts view all such transactions with suspicion and examine them with the utmost scrutiny, and if they present even a suggestion of unfair dealing, the burden of proof is on the attorney to show the honesty and good faith of the transaction and that it was

entered into by his client freely and voluntarily. The trial court was amply warranted in concluding that the honesty and good faith of the transaction had been shown, and that it had been entered into by the Bells freely and voluntarily.

There is nothing in the evidence requiring a conclusion that Mr. Crittenden was estopped to urge the invalidity of the homestead declaration. The deed from the Bells to Messrs. Crittenden and Van Wyck being valid, the land was thenceforth held by the Bells and their grantees by tenancy in common, and it is settled in this state that, under the law as it has existed for many years, land held by tenancy in common or joint tenancy cannot be selected or claimed as a homestead. (See *Schoonover v. Birnbaum*, 148 Cal. 548, [83 Pac. 999], and cases there cited.)

Certain errors of law in the admission and rejection of testimony are urged.

Objections were sustained to certain questions asked Mrs. Bell,—such as, “What were your feelings after you had read the deed over that night, and your condition during the night,” “What was your mental condition that night,” “Did you sleep that night after you read over that deed,” “Had you slept any the night previous,”—all referring to the night prior to the execution of the deed on June 12, 1897. But the witness had already testified that she was very much incensed at the provisions of the deed, and the result was that she walked the floor the whole night and neither undressed nor went to bed, and subsequently testified that she was half insane when Mr. Richards waited for her signature to the deed, and that the matter had kept her awake all that night. This sufficiently covered the subject-matter of such questions.

The record fails to show any exception to the ruling of the trial court in sustaining an objection to the question asked Mrs. Bell as to any change in her financial condition between the time of executing the deed and the filing of her cross-complaint, and this ruling therefore is not open to review.

We are unable to perceive the materiality of the question asked Mrs. Bell, as to whether Messrs. Richards & Carrier had brought actions against her and recovered judgments against her *since June 12, 1897*.

Certain questions asked Mr. Richards on his cross-examination by plaintiff's counsel and objected to by defendants, were,

we think, within the scope of a proper cross-examination. Besides, the matter elicited thereby was unimportant, and could not have prejudiced defendants.

Other questions asked Mr. Richards on cross-examination by plaintiff's counsel were not strictly within the scope of proper cross-examination. Admittedly, plaintiff's counsel would have been entitled to ask these questions, except for the claim that some of them were open to the objection of being leading, if he had been examining the witness as his own on direct examination. He did subsequently make the witness his own as to all these matters, with full opportunity to opposing counsel to cross-examine. So far as the objection that some of these questions were leading is concerned, it is apparent from the answers given by the witness that the form of the questions in no degree affected the answers.

The court did not err in striking out, on the ground that it was not responsive to the question, testimony given by Mr. Bell to the effect that Mrs. Bell "was in a terrible state and had not gone to bed all night." The question was, "State as nearly as possible what Mr. Richards said when he came to your house that morning." Learned counsel is in error in his claim that where a motion is made to strike out evidence on several grounds stated in the conjunctive, the motion must be denied unless all the objections are well based.

The order denying a new trial is affirmed.

Sloss, J., and Shaw, J., concurred.

[L. A. No. 2090. Department One.—July 1, 1908.]

EMIL KAISER, Appellant, v. U. M. BARRON, Respondent.

SPECIFIC PERFORMANCE—ADEQUACY OF CONSIDERATION—FAIRNESS OF CONTRACT—PLEADING—FINDING.—Specific performance of a contract for the conveyance of land cannot be had by a vendee where it is neither alleged nor proved that the vendor had received an adequate consideration for the contract, and that as to him it was just and reasonable, nor that facts exist which would justify the inference that such conditions existed. In the absence of such allegation and proof, a finding that the contract was fair and reasonable will not sustain a judgment decreeing specific performance.

APPEAL from a judgment of the Superior Court of Orange County. J. W. Taggart, Judge presiding.

The facts are stated in the opinion of the court.

F. C. Spencer, for Appellant.

Charles S. McKelvey, for Respondent.

SLOSS, J.—This is an action of ejectment brought by plaintiff to recover the possession of the south ten acres of a twenty-five-acre tract of land in Orange County. The defendant answered, denying plaintiff's ownership and right of possession, and filed a cross-complaint, in which he sought a decree specifically enforcing the performance of a contract between himself and one Sisson, plaintiff's predecessor in interest, for the conveyance by Sisson to defendant of the ten-acre parcel in dispute. It is alleged that plaintiff bought subject to this contract, and that its terms have been fully performed on defendant's part.

The court made findings in accordance with the allegations of the cross-complaint, and entered a judgment denying the plaintiff any relief, and requiring him to execute a deed conveying to the defendant the ten acres in controversy. The plaintiff appeals from the judgment.

In a prior action between the same parties the plaintiff sued to quiet his title to the twenty-five acres, of which the property here involved is a part. The judgment there rendered in favor of defendant was reversed by this court. (*Kaiser v. Barron*, ante, p. 474, [95 Pac. 879].) The defense in that case was based upon the contract here sought to be specifically enforced. The substance of that contract, as stated in the opinion in the earlier appeal was "that defendant would plant the northern fifteen acres (of the twenty-five-acre tract) in walnut trees, and would nurture and care for them until the first day of January, 1906, at which time, defendant having fulfilled the conditions of his contract, plaintiff's predecessor in interest agreed to convey to him the southerly ten acres." These terms appear to have been modified by the parties in a manner which is not material to this discussion.

No answer can be made to the appellant's contention that the defendant (cross-complainant) failed to establish a right

to specific relief in that he did not allege or prove that the plaintiff had received an adequate consideration for the contract, or that it was as to him just and reasonable. (Civ. Code, sec. 3391.) The cross-complaint does not allege in general terms the adequacy of the consideration or the fairness of the contract, nor does it set forth facts which would justify the inference that these conditions existed. There is no allegation of the value of the ten acres agreed to be conveyed, or of the value of the services to be performed as a consideration for the conveyance, nor is there any proof on these subjects.

That such allegation and proof are prerequisites to the granting of a decree of specific performance is thoroughly settled. "A court of equity must be satisfied that the claim for a deed is fair and just and reasonable, and the contract equal in all its parts, and founded upon an adequate consideration, before it will interpose this extraordinary assistance." (*Bruck v. Tucker*, 42 Cal. 354; see, also, *Agard v. Valencia*, 39 Cal. 302; *Nicholson v. Tarpey*, 70 Cal. 609, [12 Pac. 778]; *Morrill v. Everson*, 77 Cal. 114, [19 Pac. 190]; *Windsor v. Miner*, 124 Cal. 492, [57 Pac. 386]; *Prince v. Lamb*, 128 Cal. 120, [60 Pac. 689]; *Stiles v. Cain*, 134 Cal. 170, [66 Pac. 231].) In *White v. Sage*, 149 Cal. 613, [87 Pac. 193], the court, after citing these cases, said that "there must be a showing of the value, at least, so that the court can determine whether it was in reasonable proportion to the price to be paid, or of other facts which are sufficient to satisfy the court that the contract is just and reasonable to the buyer in all its material elements."

It is true that the court made a finding that "the terms and conditions of said contract and the consideration therefor were fair and reasonable." But this finding, regardless of the fact that it is without the issues, is not supported by any evidence.

The plaintiff's demurrer to the cross-complaint should, therefore, have been sustained. It will not be necessary to consider other points made by appellant.

The judgment is reversed with directions to the court below to sustain the demurrer to the amended cross-complaint and for further proceedings.

Angellotti, J., and Shaw, J., concurred.

[L. A. No. 2060. Department One.—July 2, 1908.]

BELLE G. STEMLER, Appellant, v. T. M. BASS, Defendant and Respondent; NELLIE O. GARVER, Intervener.

AGENCY TO SELL REAL ESTATE—AUTHORIZATION MUST BE IN WRITING.—

In the absence of subsequent ratification an agreement in writing purporting to be executed by an agent for the sale of real property belonging to his assumed principal is not binding on the latter, unless authorized in writing by the principal.

ID.—AUTHORITY OF AGENT TO MAKE CONTRACT OF SALE—EVIDENCE—

RATIFICATION—ESTOPPEL.—In an action by a vendee to specifically enforce a contract for the sale of land executed by an alleged agent of the vendor the evidence is reviewed and held to show that the agent was not authorized to make the contract sued on, or any contract of sale on behalf of the vendor, and that his only authority in addition to finding a purchaser was to consummate a purchase by paying the purchase price to a designated bank, in accordance with instructions given to it, and thereupon accepting a deed deposited with the bank, and that the principal had not ratified the contract and was not estopped to repudiate it.

ID.—AGENT MERELY TO SELL CANNOT EXECUTE CONTRACT FOR SALE.—

The ordinary authority of a real estate agent deputed to sell real estate is simply to find a purchaser, and he has no power to bind his principal by a contract of sale unless it appears that it was intended to confer such additional authority. Whether it was so intended or not is to be determined from the language used regarded in the light of the surrounding circumstances.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. W. P. James, Judge.

The facts are stated in the opinion of the court.

Wm. F. McLaughlin, and Earle & Creede, for Appellant.

John D. Pope, and Wellborn & Wellborn, for Respondents.

ANGELLOTTI, J.—This is an action by the vendee to enforce specific performance of an alleged contract for the sale of a lot of land in Huntington Park, Los Angeles County. Defendant had judgment and plaintiff appeals from such judgment and an order denying her motion for a new trial.

Plaintiff's claim is based on a written instrument executed on January 3, 1905, by one J. S. Hadden, purporting to act as the agent of defendant T. W. Bass, owner of the land, which is as follows:—

“LOS ANGELES, CAL., January 3rd, 1905.

“Received from Belle G. Stemler \$50.00 (fifty dollars) as deposit on purchase of property owned by T. W. Bass, (now of Broken Bow, Nebr.) said property located and being lot 13, block 31, Huntington Park, Los Angeles County, Cal. The balance, \$800.00 (eight hundred dollars) to be paid on transfer of the said property, clear of all encumbrances, except mortgage of \$1200.00, now held by one Katherine Kramer, which the said purchaser, Mrs. Belle G. Stemler, agrees to assume.

“The amounts above specified, namely \$800.00 and the \$50.00 deposit, constituting \$850.00 the entire equity of T. W. Bass, as per instruction of letter addressed to J. S. Hadden, dated December 28th, 1904, the said terms and amount being accepted by the purchaser.

“Signed by agent of T. W. Bass,

“J. S. HADDEN.”

The trial court found that Bass never conferred authority on Hadden to execute any contract of sale of the land, that the only authority conferred on him was to find a purchaser for the same, that Hadden had no authority to sell the same except for cash, payable immediately in bank to the credit of Bass, and that Bass withdrew the authority conferred before Hadden had made any sale in accordance therewith. The principal question on this appeal is as to the sufficiency of the evidence to sustain these findings.

Unless the agreement made by Hadden with plaintiff was authorized in writing by Bass, it was, of course, not binding upon him (Civ. Code, sec. 1624, subd. 5), unless subsequently ratified. Plaintiff seeks to show such authority in certain letters and written directions sent by Bass from the state of Nebraska, where he was residing. Bass had left California for Nebraska early in September, 1904. He had endeavored to sell this property before leaving, but had been unable to do so, and left the property in charge of Hadden, with directions to see what he could do about selling it. On the day he left

he told Hadden that if he could get twenty-one hundred dollars for the property, to sell it. There was a mortgage of twelve hundred dollars thereon, which the purchaser was to pay or assume, and the balance of the purchase money was to be paid to the owner. The first written evidence of any authority was contained in a letter from Bass to Hadden, dated September 12, 1904, wherein he said: "How did you come out with the deal on the house? I wish you would push that sale through lively as I am in need of the money." On October 19, 1904, he wrote Hadden that he had decided not to sell at present, but desired him to get a good tenant from month to month, upon certain terms. On October 26th he wrote him again that he had decided to sell, and that for the next sixty or ninety days would take nine hundred dollars net for his equity in the property. November 22d, replying to a message from Hadden that he had an offer of two thousand and fifty dollars for the place, he wrote to accept it, and let him know to whom the deed was to be made, and "I will send it to the Los Nat'l Bk., and the money can be paid there and take up the deed. Hope you will get everything through all O. K." On November 23d he wrote, stating that he had received a message to the effect that the deed should be made to Hadden, and stating: "I am sending the deed to Southern California Savings Bank and instructing them that upon the payment of \$850 to be forwarded to me and you accepting the mortgage for \$1200 in favor of Mrs. Katherine Kraemer and also the payment of \$14.24 to Mr. Burbank for the insurance policy they shall then turn over to you the deed." On November 28th, he inclosed the deed to Hadden made subject to the mortgage, the purchaser assuming the same, to such bank, with directions to deliver the same upon payment to it of eight hundred and fifty dollars, and \$24.50 insurance, and to forward such money when so paid to him. On December 14th, he wired Hadden to take up the deed, as he needed the money. On December 28th he wrote Hadden that he had paid up the insurance, and said: "Now, . . . I am in need of some money awfully bad and if you can possibly find me a buyer that will pay \$850 and take up that deed, let them have it. . . . I will write the bank to accept \$850 and turn over the deed, and purchaser to accept the mortgage of course. I do hope you can dispose of it." On the same day he

wrote to the bank: "I have paid up the insurance and also the interest to date, so upon the payment to you of \$850, you can then turn over to them the deed and send me a draft for the amount." On January 3, 1905, Hadden wired him: "Your place sold. Letter explaining. Advise bank about deed." On January 4th, he wrote Hadden, acknowledging receipt of the message, and stating that he would await the letter before advising the bank further about the deed, and that he had an offer from another party but would give Hadden the preference, if the terms were as good as those of the subsequent offer. On January 6th, he telegraphed Hadden, asking: "Have you deposit how much net to me wire answer," and received the following answer: "Eight fifty net fifty deposited guaranteed transfer on your communication." On January 7th he wrote Hadden, stating that he had advised the bank to deliver the deed upon the payment of eight hundred and fifty dollars, and on the same day he wrote the bank to deliver the deed upon such payment being made. Before the receipt of either of these communications, he on January 9th telegraphed Hadden: "Cannot accept offer on property. Letter explaining on the way," and to the bank he telegraphed: "Return deed made to J. S. Hadden to me at once cancel all negotiations." The bank at once complied with this direction. On January 10th he wrote Hadden, explaining that he had sold the property to another party for ten hundred and thirty-five dollars net. The foregoing is all the correspondence that is material. The offer referred to in the letter of November 22d was apparently not plaintiff's offer, the evidence showing that her offer was not made until January 3d.

Upon these facts the trial court was amply warranted in concluding that Hadden was not authorized to make the contract of January 3, 1905, or any contract of sale on behalf of Bass, and that his only authority in the matter, in addition to finding a purchaser, was to consummate a purchase by paying in cash to the bank selected by Bass as his agent the amount of money required by the instructions to such bank, and thereupon accepting the deed awaiting delivery upon compliance with such instructions. Until such consummation, in the absence of ratification or estoppel, Bass could be in no degree bound by any act of Hadden. The ordinary

authority of a real estate agent deputed to sell real estate is simply to find a purchaser, and he has no power to bind his principal by a contract of sale unless it appears that it was intended to confer such additional authority. (*Duffy v. Hobson*, 40 Cal. 240, [6 Am. Rep. 617]; *Armstrong v. Lowe*, 76 Cal. 616, [18 Pac. 758]; *Delano v. Jacoby*, 96 Cal. 279, [31 Am. St. Rep. 201, 31 Pac. 290].) Whether or not it was intended to confer such additional authority is to be determined from the language used regarded in the light of the surrounding circumstances. (*Rutenberg v. Main*, 47 Cal. 213.) In the case at bar, additional authority was, of course, conferred, but the limit of such additional authority was very clearly defined. The evidence showing the additional authority affirmatively showed the want of authority on Hadden's part to bind Bass by any agreement to sell. All that he could effectually do was to consummate a sale by the payment of the requisite amount in cash to the bank and the acceptance of the deed there deposited, and the writings relied on showed no attempt to confer any other authority. Such writings showed very clearly that what Bass wanted was the immediate payment of the whole purchase price in cash, that he was willing to part with his property or any interest therein only upon such payment, and that he was unwilling to cloud his title by any agreement for sale with some unknown purchaser, who might ultimately prove unwilling or unable to complete his contract, the existence of which agreement might deprive him of the opportunity to sell for cash to some other person. (See *Duffy v. Hobson*, 40 Cal. 240, [6 Am. Rep. 617].) The case at bar is very different in its facts from *Rutenberg v. Main*, 47 Cal. 213, relied on by plaintiff, where it clearly appeared that it was intended by the owner to clothe the agent with authority to do generally whatever was necessary to make the proposed sale binding upon the principal.

There was no ratification of the agreement by Bass. It does not appear that he knew that Hadden had executed any agreement for sale in writing either on his own account or as the agent of Bass, until he had by telegraph refused the offer and communicated the fact of refusal to both Hadden and the bank. (See *Lambert v. Gerner*, 142 Cal. 399, [76 Pac. 53].) His letters of date January 7, 1905, to Hadden and to the bank cannot be construed as purporting to ratify any agree-

ment for sale made for him by Hadden, and they were superseded by the telegrams of January 9th, which were received by Hadden and the bank prior to the receipt of the letters, and at once acted upon by them. No principle of estoppel applies to the case.

Our conclusion on the matters already discussed renders it unnecessary to consider any other point made.

The judgment and order are affirmed.

Shaw, J., and Sloss, J., concurred.

[L. A. No. 2074. Department One.—July 2, 1908.]

W. GEORGE J. S. BENTLEY, Respondent, v. BURT G. HURLBURT, Appellant.

B. G. HURLBURT, Appellant, v. W. GEORGE J. S. BENTLEY, Respondent.

CONSTRUCTION OF STATUTES—IMPOSITION OF PENALTY—CONTRACT IN VIOLATION OF PROHIBITION.—As a general rule, the imposition by statute of a penalty implies a prohibition of the act to which the penalty is attached, and no recovery can be had on a contract made in violation of the statutory prohibition. The rule is, however, not without exceptions, and the statute must be examined as a whole to ascertain whether it intended that a contract in contravention of it should be void or not.

RECORDING OF MAPS OF SUBDIVISION OF LAND—ACT OF MARCH 9, 1893—SALE OF LOTS BEFORE RECORDING AND AFTER FILING.—Sections 3 and 4 of the act of March 9, 1893, as amended in 1901 (Stats. 1893, p. 96; 1901, p. 288), requiring the recording of maps of subdivisions of lands into small lots for purposes of sale, and providing a penalty for selling or offering for sale such lots before such maps are filed and recorded, when properly construed only prohibits the sale or offering for sale of the certain classes of lots specified therein before a map made, acknowledged, certified, and indorsed as specified in the act shall have been presented to the recorder to be recorded. The proprietor of the land has then done all that the law imposes upon him, and a delay of the recorder in performing the ministerial duty of posting the map in the book of maps will not affect the right of the owner to make a sale, or render a sale criminal, which was made after the map was presented to the recorder and before it was pasted in the book of maps.

ID.—APPROVAL BY COUNTY SURVEYOR NOT REQUIRED—DUTY OF RECORDER.

—The act does not authorize the recorder to make an approval by the county surveyor a condition precedent to the receiving of the map; and where the map is in the form required by the act it is the recorder's duty to receive and record it.

ID.—SUBMISSION OF MAP TO SURVEYOR NOT A WITHDRAWAL FROM RECORD.

—Where a map, sufficient in form, is presented by the owner to the recorder for record, the fact that the owner subsequently, at the request of the recorder, took the map to the county surveyor did not constitute a withdrawal by him of the map; and its subsequent recording after its return by the surveyor must be regarded as having been made pursuant to its original presentation for record.

VENDOR AND VENDEE—ACTION FOR INSTALLMENTS OF PURCHASE PRICE.—

The fact that a vendor under a contract for the sale of land has parted with his title is no defense to an action by him against the vendee on the contract of sale to recover intermediate installments of the purchase price. When the final installment falls due, it will for the first time become important to ascertain whether the vendor is able to comply with his agreement to convey a good title.

NEW TRIAL—EXCESSIVE JUDGMENT—WAIVER OF EXCESS—DENIAL OF

MOTION.—Where pending a defendant's motion for a new trial the plaintiff files a written waiver of an excessive amount included in the judgment in his favor, the court may, by an order unconditional in form, recite such waiver and deny the motion at once.

ID.—AFFIDAVITS USED ON MOTION—BILL OF EXCEPTIONS.—Affidavits

included in the transcript, purporting to show newly discovered evidence and to have been used on a motion for a new trial, cannot be considered on an appeal from an order denying the motion unless authenticated by being embodied in a bill of exceptions or otherwise as required by rule XXIX of the supreme court.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial.
W. P. James, Judge.

The facts are stated in the opinion of the court.

O. B. Carter, for Appellant.

Tanner, Taft & Odell, for Respondent.

SLOSS, J.—The two above-entitled actions were, by order of court, consolidated and tried together. *Bentley v. Hurlburt* is an action to recover installments claimed to be due on

twenty-five contracts for the sale by Bentley to Hurlburt of lots of land in the city of Santa Monica, Los Angeles County. The complaint is in twenty-five counts or causes of action. The first alleges that on June 19, 1905, the plaintiff sold to defendant lot 4 in block 4 of the Fountain Glen Tract, and the defendant agreed to pay therefor the sum of three hundred and fifty dollars, as follows: Ten dollars at the date of the contract, ten dollars on the nineteenth day of July, 1905, and ten dollars on the nineteenth day of each month thereafter until the whole was paid, with interest on deferred payments. It is alleged that the defendant paid the installments for June, July, August, and September, 1905, but had failed and refused to pay any further amounts of principal or interest. The plaintiff alleges performance of all conditions of the contract to be performed by him to the time of commencing the action. Each of the other counts is in the same form, except that different lots of the same tract and different amounts of purchase price are set forth. The complaint was filed on February 24, 1906, and prayed judgment for \$1,532.25, together with such further sums as might accrue under said contracts before entry of judgment.

The answer denies that plaintiff sold to defendant any of the lots, denies that any contract was ever entered into between the parties for the sale of any of such lots, and denies that defendant paid to plaintiff any sums of money, pursuant to the terms of any contract for such sale. The answer also contains a counterclaim, in the form of a common count for money had and received by plaintiff to the defendant's use, in the amount of ten hundred and ninety dollars.

The action of Hurlburt v. Bentley was in two counts, one setting forth the same cause of action as that contained in the counterclaim just mentioned, and the other a similar claim for one hundred and eighty dollars, alleged to have been had and received by plaintiff to the use of Mrs. R. E. Kempton, said claim having been assigned to Hurlburt. Bentley's answer to this complaint consisted of denials of the material allegations, and a counterclaim for the sums involved in the first action. There was a further counterclaim for five hundred and ten dollars, alleged to be due from Mrs. R. E. Kempton to Bentley on contracts similar to those set up in the action of Bentley v. Hurlburt.

The findings of the court were in favor of Bentley, and he recovered judgment for \$2,648.10. From the judgment and an order denying a motion for new trial Hurlburt appeals.

It is not disputed that the parties did, in fact, sign and deliver writings purporting to bind them to the terms of the contracts set up in the original complaint. Nor is there any question (except in a particular to be mentioned) regarding the amount paid on these contracts or the amounts due thereon at the time the judgment was entered. The appellant's position is that the contracts were totally void, and that, as a consequence, Bentley cannot enforce them, while, on the contrary, the amounts paid on such void contracts by the proposed vendee may be recovered by him. It is this right to recover payments already made that is asserted in the counterclaim in the first action and the complaint in the second.

The claim of invalidity is based on the provisions of an act entitled "An act requiring the recording of maps of cities, towns, additions to cities or towns, or subdivisions of lands into small lots or tracts for the purposes of sale, and providing a penalty for the selling or offering for sale any lots or tracts in cities, towns, additions to cities, towns, subdivisions, or additions thereto, before such maps are filed and recorded," approved March 9, 1893. (Stats. 1893, p. 96.) The act reads as follows:—

"Section 1. Whenever any city, town, or subdivision of land into lots, or any addition to any city, town, or such subdivision, shall be laid out into lots for the purposes of sale, the proprietor or proprietors thereof shall cause to be made out an accurate map or plat thereof, particularly setting forth and describing:

"First—All the parcels of ground within such city, town, addition, or subdivision, reserved for public purposes, by their boundaries, courses, and extent, whether they be intended for avenues, streets, lanes, alleys, courts, commons, or other public uses; and,

"Second—All lots intended for sale, either by number or letter, and their precise length and width.

"Sec. 2. Such map or plat shall be acknowledged by the proprietor, or if any incorporated company, by the chief officer thereof, before some officer authorized by law to take the acknowledgment of conveyances of real estate.

"Sec. 3. The map or plat so made, acknowledged, and certified, shall be filed in the office of the county recorder of the county in which the city, town, addition, or subdivision is situated.

"Sec. 4. Every person who sells, or offers for sale, any lot within any city, town, subdivision, or addition, before the map or plat thereof is made out, acknowledged, filed, as herein provided, is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars, and not more than five hundred dollars, or by imprisonment in the county jail not to exceed six months, or both such fine and imprisonment."

In 1901 section 3 of the act was amended to read as follows:—

"Section 3. The map or plat so made, acknowledged, and certified shall be presented to the governing body having control of the streets, roads, alleys, and highways in the territory shown on the map or plat, and said governing body shall indorse thereon which streets, roads, alleys, and highways, offered by said map or plat, they accept on behalf of the public, and thereupon such streets, roads, alleys, and highways, only as have been thus accepted, shall be and become dedicated to public use. When so indorsed, and not before, said map or plat shall be recorded in the office of the county recorder of the county in which the city, town, addition, or subdivision is situated, in a book kept for that purpose. The map or plat shall be no more than thirty-six inches by thirty-six inches in size, and shall be drawn in all details clearly and legibly, and if not so drawn may be refused by the county recorder. When such map or plat is presented to be recorded the county recorder shall paste the same securely in a book of maps, and it shall then be deemed to have been recorded under the provisions of this act." (Stats. 1901, p. 288.)

The contention of the appellant is that the sale of the lots in question was made in advance of the filing or recording of a map or plat thereof, and that, as such sale was an act to which the law affixed a penalty, it was prohibited and void, and could not be the basis of an action to recover money agreed to be paid under the contract of sale. That the imposition by statute of a penalty implies a prohibition of the act to which the penalty is attached, and that no recovery can be

had on a contract made in violation of statutory prohibition, is doubtless the general rule. (Civ. Code, sec. 1667; *Berka v. Woodward*, 125 Cal. 119, 127, [73 Am. St. Rep. 31, 57 Pac. 777], and cases cited.) The rule is, however, not without exceptions. In *Harris v. Runnels*, 12 How. (U. S.) 79, the supreme court of the United States said, "Before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, the statute must be examined as a whole, to find out whether the makers of it meant that a contract in contravention of it should be void, or that it was not to be so." While the statute here under consideration has not been construed by this court, statutes substantially similar have been brought for interpretation before the courts of other states. In a majority of the cases it has been held that a contract of sale made in violation of such a statute was not void, and that the vendor could recover the purchase price in an action on the contract. (*Strong v. Darling*, 9 Ohio, 201; *Bemis v. Becker*, 1 Kan. 226; *Pangborn v. Westlake*, 36 Iowa, 546.) The contrary was decided in *Downing v. Ringer*, 7 Mo. 585.

It will not be necessary for us to choose between these opposing views, for the reason that we are satisfied that the court below was justified by the evidence in concluding that Bentley had substantially complied with the statute. The facts, as testified to by respondent's witnesses, were these: A map of the Fountain Glen Tract, in which the lots sold were situated, was acknowledged by Bentley on the twenty-seventh or the twenty-ninth day of May, 1905. He took the map to the city engineer, who, after referring it to the city council, returned it to Bentley on June 6th. On June 7th or 8th Bentley went to the office of the county recorder and handed the map and fifty cents to the recorder. The latter looked at the map and told Bentley to take it to the county surveyor's office and leave the fifty cents. Bentley did so. The county surveyor sent the map to the city surveyor of Santa Monica, with a note requiring some corrections. These were made and the map returned to the county surveyor, who, on July 3, 1905, delivered it to the recorder to be recorded. The sale of the lots in question was made on June 19th, after Bentley had tendered the map, with the fee for recording, to the

recorder, but before the map, as corrected, had been returned to the recorder's office.

As above stated, we think that these facts showed a compliance, on Bentley's part, with the provisions of the law. Section 3 of the act, as originally enacted, required merely that the map be "filed" in the recorder's office. Under the amended section 3 it must be "recorded," and it is provided that it shall be deemed to be recorded when it has been, by the recorder, pasted securely in the book of maps. Section 4 of the act, the section imposing the penalty, does not use the word "recorded." It defines as a misdemeanor the selling or offering for sale of lots "before the map or plat thereof is made out, acknowledged, filed." Under the original act the proprietor of the land had unquestionably done all that was required as a prerequisite to selling lots when he had tendered a proper map, together with the legal fee, to the recorder for filing. The amendment to section 3, requiring a certain method of recording, did not enlarge the terms of section 4 which made it a misdemeanor to sell, or offer for sale, before the map was "filed." The new section 3 refers to two acts—the presentation of the map for recording and the pasting in a book. The former, which is to be performed by the party who seeks to have the map recorded, may well be called a "filing." The latter, which is the act of the recorder, is by the act itself defined as a recording. We think the reasonable construction of the act, as amended, is that it prohibits the sale or offering for sale of certain classes of lots before a map, made, acknowledged, certified, and indorsed as specified in the law, shall have been presented to the recorder to be recorded. The "proprietor" of the land has then done all that the law imposes upon him, and a delay on the part of the recorder in performing the ministerial duty of pasting the map in a book will not affect the right of the owner to make a sale, or render such sale criminal.

Here the owner, Bentley, had so presented the map to be recorder. The recorder did not refuse it, as, under section 3, he was authorized to do if the map was not drawn "clearly and legibly," or was not of the required size. What he did was to request Bentley to take the map to the county surveyor. The law did not authorize him to make an approval by the county surveyor a condition precedent to the receiving

of the map. If it was "not more than 36 inches by 36 inches in size" and was "drawn in all details clearly and legibly," it was the recorder's duty to receive and record it. Bentley, in taking the map to the surveyor, did not withdraw it, and the subsequent recording must be regarded as having been made pursuant to the original presentation of the map on June 7th or 8th. The sale of the lots on June 19th was therefore proper, and the statute affords to Hurlburt no ground for refusing to pay the amounts which he agreed to pay, or for the return of installments paid under the contract.

It is argued by appellant that there can be no recovery on the contract for the reason that there was evidence that Bentley had parted with his title to the land. This evidence was immaterial. The action is one at law to recover money agreed to be paid by defendant. The plaintiff alleges, and there is no denial, that he has performed all the conditions of the contract to be performed by him. Hurlburt was not entitled to a conveyance until payment of the entire purchase price. When the final installment shall fall due, it will for the first time become important to ascertain whether the vendor is able to comply with his agreement to convey a good title.

The judgment, as entered, included \$460.95, the amount due on contracts between Bentley and Mrs. Kempton. It is conceded that this sum could not be recovered in an action against Hurlburt. In the order denying appellant's motion for a new trial it is recited that the judgment is excessive in the sum of \$460.95, and that Bentley has filed a written waiver of said amount. The denial of the motion follows these recitals. This, it is claimed, did not obviate the error in the original judgment. It has, however, long been settled in this state that on a motion for new trial the court may, if the judgment be excessive, make a conditional order denying the motion if the prevailing party will consent to remit the excess and granting it in the absence of such consent. (*Benedict v. Cozzens*, 4 Cal. 381; *Chapin v. Bourne*, 8 Cal. 294; *Gillespie v. Jones*, 47 Cal. 259; *Clanton v. Coward*, 67 Cal. 373, [7 Pac. 787]; *Thomas v. Gates*, 126 Cal. 1, [58 Pac. 315].) If, upon such conditional order being made, the consent to the reduction be filed, the usual practice has been to enter an absolute order denying the motion. This is, in effect, what happened in the present case. The fact that the plain-

tiff's consent to remit preceded the making of any order on the motion for new trial made it unnecessary for the court to make an order conditional in form, giving the plaintiff a certain time within which to file his consent to the reduction. The consent having already been filed, the court could properly act upon such consent and deny the motion at once.

The transcript contains copies of certain affidavits which are claimed by appellant to show newly discovered evidence, on which a new trial should have been granted. These affidavits are not, however, authenticated by being incorporated in a bill of exceptions (rule XXIX of this court, 144 Cal. lii, [78 Pac. XII]), or otherwise, and they cannot, therefore, be considered on this appeal. (*Melde v. Reynolds*, 120 Cal. 234, [52 Pac. 491]; *Esert v. Glock*, 137 Cal. 533, [70 Pac. 479].)

The judgment and order appealed from are affirmed.

Shaw, J., and Angellotti, J., concurred.

Hearing in Bank denied.

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ACCORD AND SATISFACTION. See Pleading, 1.

ACCOUNTING. See Agency, 4, 5.

ADVERSE POSSESSION.

ACTUAL OCCUPANCY—CLAIM OF TITLE NOT FOUNDED ON WRITTEN INSTRUMENT.—Under sections 324 and 325 of the Code of Civil Procedure, a title to land by adverse possession, under a claim of title not founded upon a written instrument, judgment, or decree, can be acquired only to the land actually occupied, and the land so occupied is such land as has been protected by a substantial inclosure, or land which has been usually cultivated or improved. (Los Angeles Inter-Urban Railway Company v. Montijo, 15.)

See Dedication; Insurance, 5, 6; Water and Water-Rights, 2, 3.

AGENCY.

1. **AGENCY TO SELL REAL ESTATE—AUTHORIZATION MUST BE IN WRITING.**—In the absence of subsequent ratification an agreement in writing purporting to be executed by an agent for the sale of real property belonging to his assumed principal is not binding on the latter, unless authorized in writing by the principal. (Stemler v. Bass, 791.)
2. **AUTHORITY OF AGENT TO MAKE CONTRACT OF SALE—EVIDENCE—RATIFICATION—ESTOPPEL.**—In an action by a vendee to specifically enforce a contract for the sale of land executed by an alleged agent of the vendor the evidence is reviewed and held to show that the agent was not authorized to make the contract sued on, or any contract of sale on behalf of the vendor, and that his only authority in addition to finding a purchaser was to consummate a purchase by paying the purchase price to a designated bank, in accordance with instructions given to it, and thereupon accepting a deed deposited with the bank, and that the principal had not ratified the contract and was not estopped to repudiate it. (Id.)
3. **AGENT MERELY TO SELL CANNOT EXECUTE CONTRACT FOR SALE.**—The ordinary authority of a real estate agent deputed to sell real estate is simply to find a purchaser, and he has no power to bind his principal by a contract of sale unless it appears that it was intended to confer such additional authority. Whether it was so intended or not is to be determined from the language used regarded in the light of the surrounding circumstances. (Id.)

AGENCY (Continued).

4. **ACCOUNTING—FINDINGS AS TO DAMAGES—JUDGMENT.**—In an action against an agent for an accounting and for damages arising out of several alleged transactions, where the findings show the damages arising from a particular transaction in the sum of forty thousand dollars, and the amount of the further damages arising from the other transactions specifically alleged, a judgment rendered in favor of the plaintiff for the sum of forty thousand dollars, without anything by which the sum awarded can be made referable to any one or more of the particular transactions alleged, cannot be assailed for a failure to find upon an issue of fact. (*Great Western Gold Co. v. Chambers*, 307.)
5. **FRAUDULENT OPTION TO PURCHASE TAKEN BY AGENT—LIABILITY OF AGENT FOR EXCESS OVER ACTUAL PURCHASE PRICE.**—Where an agent, as the result of a fraudulent conspiracy between himself and the vendor, takes an option to purchase certain property for his principal for an amount in excess of the actual selling price agreed upon by him and the vendor, the principal, after acquiring knowledge of the facts, is not required to rescind, but may execute the option by paying the vendor the full purchase price expressed therein, and may hold the agent liable for the difference between the amount so paid and the price at which the property was actually acquired by the agent. (*Id.*)

APPEAL.

1. **ARGUMENT UPON APPEAL—POINTS FIRST RAISED IN REPLY BRIEF—WAIVER.**—The court is at liberty to treat points for the appellant not raised in his opening brief, and raised for the first time in his reply brief as waived, where no good reason appears for such course, and it does not appear that appellant would be unjustly affected by the refusal of the court to consider them. (*Hibernia Savings and Loan Society v. Farnham*, 578.)
2. **APPEAL FROM JUDGMENT—WANT OF JURISDICTION—DISMISSAL.**—An appeal from a judgment taken more than six months after its entry must be dismissed for want of jurisdiction. (*Sequeira v. Collins*, 426.)
3. **APPEAL FROM ORDER DENYING NEW TRIAL—COMPLAINT AND FINDINGS CANNOT BE CONSIDERED.**—Upon an appeal from an order denying the defendants a new trial the appellate court cannot consider either the sufficiency of the complaint or of the findings to support the judgment. (*Crescent Feather Company v. United Upholsterers' Union, Local No. 28*, 433.)
4. **DISMISSAL AFTER SETTLEMENT OF CONTROVERSY—COSTS ON APPEAL.**—An appeal will be dismissed, if during its pendency all matters in dispute in the action are settled by agreement between the parties. The appellate court will not, after such settlement of

APPEAL (Continued).

the controversy, retain and decide the questions involved on the appeal solely for the purpose of incidentally determining who shall pay the costs on appeal. (*Nelson v. Nelson*, 204.)

5. **CRIMINAL LAW—FAILURE TO FILE BRIEF OR APPEAR ON ARGUMENT.**—The failure of the appellant in a criminal case to file a brief on his appeal or to appear on oral argument is sufficient reason for affirming the judgment and order refusing a new trial appealed from. (*People v. Albitre*, 367.)
6. **DISMISSAL ON MOTION—FAILURE TO SERVE ADVERSE PARTY—EXAMINATION OF RECORD.**—An appeal from a judgment will not be dismissed in advance of the hearing upon the merits, on the ground that the notice of appeal was not served upon an adverse party, when the determination of the question whether the party not served was adverse or not necessitates an examination of the record. The objection may be urged at the time of the hearing on the merits. (*Quist v. Michael*, 365.)
7. **NEW TRIAL—TRIAL ON AGREED FACTS—JURISDICTION—FRIVOLOUS APPEAL.**—The trial court has jurisdiction to entertain a motion for a new trial of a case that was tried on an agreed statement of facts and a stipulation waiving findings, and the supreme court has likewise jurisdiction of an appeal from an order denying such motion. Such an appeal will not be dismissed, on motion, and the supreme court will not, in advance of the hearing on the merits, examine the record to determine whether or not it is frivolous. If it appears to be frivolous at such hearing, the respondent's right will be adequately protected by the imposition of a penalty. (*Id.*)
8. **ORDER REFUSING NEW TRIAL—QUESTIONS REVIEWABLE ON APPEAL.**—Upon an appeal from an order denying a new trial, the appellate court is limited in its review of the action of the trial court to the grounds upon which such a motion may be based, and upon which the new trial was asked. Questions relating to the sufficiency of the complaint, rulings upon demurrers, and the sufficiency of the findings to support the judgment, cannot be considered on such an appeal. (*Great Western Gold Company v. Chambers*, 307.)
9. **FAILURE TO FIND—DECISION AGAINST LAW—GROUNDS OF MOTION FOR NEW TRIAL.**—The failure of the trial court to make a finding of fact upon a material issue renders the decision one against law, and error in overruling a motion for a new trial made on that ground may be reviewed on appeal from the order. But in the absence of anything in the record to show that the motion for new trial was made on such ground, it cannot on appeal be presumed that it was. (*Id.*)

APPEAL (Continued).

10. **NOTICE OF INTENTION—RECORD ON APPEAL.**—It is not essential that the notice of intention to move for a new trial should be incorporated in the statement or bill of exceptions, but for purposes of review on appeal, it is essential that it should appear by the record that the ground for a new trial presented on appeal was presented by the motion in the trial court. The record being otherwise silent upon the matter, this may be made to appear by proper specification of error in the statement or bill of exceptions; but the mere general specifications that the court erred in rendering judgment as it did are not sufficient to constitute such a showing. (Id.)
11. **NEW TRIAL—ADVERSE PARTY SERVED WITH NOTICES OF INTENTION—DEATH PENDING MOTIONS—APPEALS FROM ORDERS—SERVICE OF NOTICE.**—An adverse party, to whom the notices of intention of various parties separately moving for a new trial were addressed, and who was served therewith, became a party to each proceeding on motion for a new trial, and did not cease to be a party thereto by reason of his death after such service, before the motions were heard; and upon appeal from each of the orders denying such motions his representative must be served with the notice of appeal. (Bell v. San Francisco Savings Union, 64.)
12. **REPRESENTATIVE NOT APPOINTED—LOSS OF APPEALS—ORDERS NOT REVERSIBLE.**—If a representative of the estate of such adverse party has not been appointed, and cannot be appointed in time for appeal, the appeals are lost, and the orders cannot be reversed, and if not dismissed must be affirmed. (Id.)
13. **SERVICE UPON ATTORNEY OF ADVERSE PARTY—TERMINATION OF AUTHORITY.**—The death of the adverse party operated as a termination of the authority of his attorney, and the service of notices of appeal upon him was ineffective. (Id.)
14. **NOTE SIGNED BY ADVERSE PARTY—MOTION BY SECURED CREDITOR TO DISMISS APPEALS BASED ON RECORD—FAILURE TO PRESENT CLAIM NOT CONSIDERED.**—Where the adverse party was the maker of a note to a secured corporation which moved to dismiss appeals for failure to serve the adverse party with notice thereof, the motion must be determined only by what appears in the record upon appeal; and a showing that the creditor secured had not presented a claim against the estate of the adverse party cannot be considered. (Id.)
15. **VOLUNTARY APPEARANCE OF EXECUTOR OF ADVERSE PARTY—LAPSE OF TIME FOR APPEAL—JURISDICTION NOT CONFERRED.**—The voluntary appearance of the executor of the adverse party, after the lapse of the time for appeal from the orders denying a new trial, cannot confer jurisdiction to determine such appeals upon the merits. (Id.)

APPEAL (Continued).

- 16. APPEALS RETAINED FOR MODIFICATION OF JUDGMENT BENEFITING APPELLANTS AND ADVERSE PARTY.**—Though no modification of the judgment can be allowed to the detriment of the estate of the adverse party, the appeals will be retained for modification of the judgment in favor of the creditor secured in respect of excessive interest allowed, which will benefit and not injure the estate of the adverse party, and will also benefit the appellants in the matter of an accounting between estates represented by them, which are included in the security held by such creditor. (Id.)

See *Certiorari*; *Estates of Deceased Persons*, 2-4, 18, 22-24; *Evidence*, 5; *Findings*; *Mortgage*, 6; *Negligence*, 16; *New Trial*, 5, 6, 9; *Partition*, 1, 3-5; *Practice*, 2; *Schools*, 8; *Specific Performance*, 7; *Wills*, 14.

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ATTORNEY AND CLIENT.

ATTORNEY AND CLIENT—GOOD FAITH IN TRANSACTIONS BETWEEN.—In all dealings with his client the highest degree of fairness and good faith is required of an attorney, and the courts view all such transactions with suspicion and examine them with the utmost scrutiny, and if they present even a suggestion of unfair dealing, the burden of proof is on the attorney to show the honesty and good faith of the transaction and that it was entered into by his client freely and voluntarily. Tested by this rule, it is held that the evidence was sufficient to warrant the trial court in concluding that the honesty and good faith of the transaction involved herein had been shown, and that it had been entered into by the defendants freely and voluntarily. (*U. S. Oil and Land Company v. Bell*, 781.)

See *Appeal*, 13.

BILL OF EXCEPTIONS.

- 1. INCORRECT ENGROSSMENT—REFUSAL TO CERTIFY.**—A trial judge is justified in refusing to sign and certify an engrossed bill of exceptions if it fails to truly and fully set forth the matters directed to be inserted therein on the settlement thereof or to correctly exhibit the proceedings which the bill purports to introduce into the record on appeal. (*Galvin v. Hunt*, 103.)
- 2. EXCUSABLE OMISSION IN ENGROSSMENT—PAPERS IN POSSESSION OF ADVERSE PARTY—EXTENSION OF TIME FOR ENGROSSMENT.**—A trial judge would not be justified in refusing to sign and certify

BILL OF EXCEPTIONS (Continued).

an engrossed bill of exceptions solely because it failed to set out certain documents which were ordered to be inserted on the settlement of the bill, when the failure was due to the facts that the originals of such documents had been lost and the only existing copies thereof were in the possession of the adverse party, who refused to permit them to be used for insertion in the bill. Under such circumstances the judge should require the adverse party to produce the copies and grant further time for their insertion in the engrossed bill. (Id.)

See New Trial, 7-9, 13.

BONDS. See Counties, 3, 6; Municipal Corporations, 1-7; Schools, 6-8.

BOUNDARIES.

1. **BOUNDARY LINE OF CITY LOTS—UNCERTAIN POSITION—AGREED LINE CONFIRMED BY OCCUPATION—TRUE LINE IN LAW.**—When adjoining owners of city lots, being uncertain of the true position of the boundary line between them, agree upon its true location, mark it upon the ground, build up to it, and occupy on each side of it for more than thirty years, under such circumstances that substantial loss would be caused by a change of its position, such line becomes, in law, the true line called for by the respective descriptions of the lots, regardless of the accuracy of the agreed location, as it may appear by subsequent measurements. (Young v. Blakeman, 477.)
2. **OBJECT OF RULE—REPOSE AGAINST STRIFE—RULE BINDING UPON SUCCESSORS.**—The object of the rule confirming occupation according to an agreed line, for a period up to or beyond the statute of limitations, is to secure repose against strife, and make titles permanent; and the rule not only binds the parties, but also their successors by subsequent deeds. (Id.)
3. **ORAL AGREEMENT FOR DIVISION LINE—STATUTE OF FRAUDS—DIVISION LINE ATTACHED TO DEEDS—TITLE TO EXCESS.**—An oral agreement upon a division line, which is established by actual occupation of the parties for the requisite period is not within the statute of frauds. Title is not thereby transferred; but the division line, when established, attaches itself to the deeds of the respective parties, and simply defines the lands described in each deed, and if more land is given to one than the calls of his deed actually require, he holds the excess by the same tenure that he holds the main body of his lands. (Id.)
4. **LOTS OCCUPIED BY BUILDINGS FOR STATUTORY PERIOD—LEASE OF LARGE LOT WITH OPTION TO PURCHASE—PRESUMPTION—ESTOPPEL.**—Where the adjoining lots were occupied by buildings for the statutory period, the grantee of the lot containing the excess is pre-

BOUNDARIES (Continued).

sumed to take up to the agreed line, and the grantor is estopped from withholding from the grantee possession up to the agreed line; and a subsequent conveyance from his heirs to the appellant for the excess carried no title, unless the purchaser is estopped from claiming the contrary. (Id.)

5. **EQUITABLE ESTOPPEL OF PURCHASER—PLEADING—EVIDENCE IN REPLY TO ANSWER.**—Where the plaintiff relied upon an equitable estoppel of the purchaser to claim up to the agreed line, pleaded in the answer, he was entitled to offer evidence in reply to the answer without being called upon to plead such equitable estoppel. (Id.)

6. **EQUITABLE ESTOPPEL, NOT PROVED—DEED UNDER OPTION ATTACHED TO AGREED BOUNDARY—SETTLEMENT WITH DIFFERENT POSSESSION.**—Where the grantor of the option to purchase held by his building up to the agreed boundary the purchaser under the option took title up to that line, as attaching to his deed, without reference to its description; and a mere agreement by the holder of the option to sell a smaller strip on the other side of the lot to an adverse possessor thereof, against whom the grantor of the option laid no claim, the price of which was merely fixed as the estimated cost of a suit to quiet the title of the adverse possessor, did not prove an equitable estoppel of the purchaser, as grantee, to take title to the agreed lines, he not having been put by the grantor or his heirs to any election as to that matter. [Beatty, C. J., dissenting.] (Id.)

See Deed.

BRIDGES. See Counties, 3.

CERTIORARI.

1. **WRIT OF REVIEW—ORDER DIRECTING PAYMENT TO RECEIVER OF INSOLVENT BANK—FINAL ADJUDICATION—REMEDY BY APPEAL.**—A writ of review will not lie to annul an order directing the payment of money by the plaintiff to a receiver of an insolvent bank, notwithstanding the claims of third parties to part of the funds who had been allowed to intervene, where the order, however erroneous, was in effect a final adjudication of the rights of all parties, an appeal from which will afford the petitioner for the writ an adequate remedy. (Anglo-Californian Bank, Limited, v. Superior Court, 753.)
2. **APPEALABLE ORDER IN EXCESS OF JURISDICTION.**—An appealable order, even if in excess of jurisdiction cannot be reviewed in *certiorari* proceedings. (Id.)

CHURCH. See Statute of Limitations, 3, 4.

CLAIM AND DELIVERY. See Pledge, 2.

COLLATERAL INHERITANCE TAX. See Estates of Deceased Persons, 5-17.

COMMUNITY PROPERTY. See Estates of Deceased Persons, 9-13; Husband and Wife, 2-7, 12-19.

CONSTITUTIONAL Law, 3, 5; Counties, 6; Criminal Law, 3; Estates of Deceased Persons, 12, 15; Holidays; Insane Persons, 5, 6; Police Court; Taxation, 11-17.

CONTRACTS.

1. **CONTRACTS WITH RAILROAD COMPANY—VIOLATION OF PUBLIC POLICY.**—Contracts by a railroad company with individuals to preclude itself from establishing or locating depots and stations on it, at any other than certain localities, or within certain prescribed limits, and contracts with individuals or officers or agents assuming to have influence with the railroad company, agreeing for a consideration to secure the location of stations or depots in a particular locality, or secure the building of its road by a particular route, are void, as being in violation of public policy. (*McCowen v. Pew*, 735.)
2. **VALID CONTRACTS—OTHER ROUTES OR STATIONS NOT EXCLUDED—INDUCEMENT FOR PARTICULAR ROUTE.**—A railroad company has the right to select any particular route for the location of its road; and contracts, where the consideration moves directly from the individual to the railroad company as an inducement to the construction of its line between certain points, and contracts for the establishment of depots or stations at particular points on the route selected, where there is no provision or stipulation that the route selected, or depot, or station to be established, is to be located or established to the exclusion of other routes and locations, are valid, and enforceable. (*Id.*)
3. **SPECIFIC PERFORMANCE—CONTRACT WITH OWNERS OF TIMBERLANDS.**—Specific performance may be decreed of a contract by the owners of timber-lands along one of four routes contemplated by a railroad company for the construction of its proposed railroad conferring upon it an option to purchase their timber-lands at their fair cash value, as an inducement to locate its road over a particular proposed route, which would benefit their other lands and also would benefit the railroad company in the matter of freight, in the absence of any showing that the route selected was injurious to the public. (*Id.*)
4. **PRESUMPTION IN FAVOR OF VALIDITY OF CONTRACT—ERROR OF COURT.**—It was error for the court to hold that such contract for the sale of timber-lands to secure the location of a particular

CONTRACTS (Continued).

route was void *per se*, as against public policy. A contract should not be declared in contravention of public policy, unless it affirmatively appears to be so. Public policy supports contracts made in inducement to the building of a railroad, between certain points, in the absence of a showing that they were made in disregard of the public convenience, and in violation of the clear wants and necessities of the people. (Id.)

5. **ACTION TO RESCIND PURCHASE OF MACHINE—WRITTEN CONTRACT—EXPRESS WARRANTY—EVIDENCE—ORAL REPRESENTATION AND IMPLIED WARRANTIES INADMISSIBLE.**—In an action to rescind a written contract for the purchase of a machine containing an express warranty, all oral representations and implied warranties are merged in the written contract, and evidence thereof is inadmissible to vary its terms. (Kullman, Salz & Co. v. Sugar Apparatus Manufacturing Company, 725.)
6. **EXPRESS ALLOWANCE OF TIME TO EXPERIMENT.**—The fact that by the terms of the written contract time was allowed for experiment with the machine, and that, in case it was returned, the advance payment was to be retained in consideration of the return of a second-hand machine, negatives the idea that there was any other warranty than that expressed in the written contract. (Id.)
7. **USE OF TRADE NAME IN CONTRACT.**—The mere use of a trade name in the written contract cannot carry with it implied warranties not expressed in the contract. (Id.)
8. **CODE WARRANTIES NOT PLEADED OR PROVED.**—Code warranties contained in sections 1767, 1769, and 1776, of the Civil Code, which were not pleaded or proved cannot be relied upon by the plaintiff. (Id.)
9. **BREACH OF EXPRESS WARRANTY—SUPPORT OF FINDING—CONFLICT—RESCISSION JUSTIFIED—ERROR IN EVIDENCE NOT PREJUDICIAL.**—Where a breach of the express warranty was pleaded as a ground of rescission of the contract, and a finding of such breach was supported by the evidence for the plaintiff, notwithstanding conflicting evidence for defendant to the contrary, such finding and proof justified the judgment rescinding the contract, and the error in receiving inadmissible proof of oral representations and implied warranties was not prejudicial, and will not necessitate a new trial. (Id.)
10. **ACTION UPON CONTRACT TO PURCHASE STOCK—INDEPENDENT AGREEMENT—EVIDENCE—VARIANCE NOT SHOWN.**—In an action upon an alleged contract to purchase fifty shares of stock in a corporation at sixty dollars per share, in case of any default in the payment of an annual dividend of not less than three and one half per cent on each of said shares, at that price, it being alleged that no dividends were paid, where the contract offered in evidence to prove the cause

CONTRACTS (Continued).

- of action alleged, contained an independent agreement to make good each annual dividend, in event of non-payment thereof at the rate of three and a half per cent upon plaintiff's investment, it does not establish any variance. (*Marinovich v. Kilburn*, 638.)
11. **WANT OF CONSIDERATION OF CONTRACT OF PURCHASE—PERFORMANCE OF PLAINTIFF'S OBLIGATION.**—Where plaintiff had only paid seven hundred and fifty dollars on account of the purchase of fifty shares of stock at a price of three thousand dollars, and the contract was made by defendant to repurchase the stock, to induce the defendant to perform his obligation to pay up his subscription to the stock, neither the existence of that duty, nor the performance of it by the plaintiff would constitute any consideration for the contract by defendant to purchase the stock. (*Id.*)
 12. **CONTRACT INDUCED BY FRAUD—EVIDENCE—QUESTION FOR JURY.**—Where there was some evidence tending to show that the contract by the plaintiff to buy the stock was induced by defendant's fraud, and the evidence was conflicting as to whether the fraud was connected with defendant's agreement to buy the stock, the court should have left the question to the jury under proper instructions. (*Id.*)
 13. **ERRONEOUS INSTRUCTIONS—FRAUD BEARING ON CONSIDERATION.**—After the court had properly instructed the jury as to the insufficiency of plaintiff's obligation to pay up his subscription to stock as a consideration, it was erroneous to instruct them, in effect, that the mere existence of the fact, if found by them, that plaintiff was induced to buy the stock from the company solely by the fraud of the defendant, constituted a sufficient consideration for defendant's subsequent contract to buy the stock, without providing for any finding as to the connection of the fraud with such contract. (*Id.*)
 14. **BUILDING CONTRACT—CERTIFICATE OF SATISFACTORY WORK.**—Where work is to be done to the satisfaction of a person, evidenced by a certificate to that effect, the production of such a certificate is a condition precedent to a right of action upon the contract. (*Coplew v. Durand*, 278.)
 15. **ARCHITECT'S CERTIFICATE WHEN EXCUSED.**—Where a building contract provides that the work is to be done to the satisfaction of the owner and his architect, and evidenced by the certificate of the latter, and the work is completed to their satisfaction, and thereafter the architect without warrant refuses to issue his certificate for the final payment, his refusal under such circumstances is unreasonable, and the necessity for the production of the certificate is dispensed with. (*Id.*)
 16. **FINDING AS TO SATISFACTORY COMPLETION OF WORK.**—In an action by the contractor to recover the contract price, a direct finding that the work was done to the satisfaction of the architect, impliedly

CONTRACTS (Continued).

but positively negatives the contention that the architect was, during the progress of the work, insisting that it was imperfect and incomplete. (Id.)

17. **ACTION BY CONTRACTOR—COUNT FOR LABOR DONE AND MATERIALS FURNISHED—SUPPORT OF FINDING AND JUDGMENT.**—In an action by a contractor to recover upon a first count for labor done and materials furnished by plaintiff's assignor in constructing and laying pipe-lines and building concrete boxes for defendant, *held* that there is sufficient evidence to support a finding for plaintiff on that count, notwithstanding conflicting evidence to the contrary, and the judgment rendered thereupon will be affirmed. (*Davissou v. East Whittier Land and Water Company*, 81.)
18. **SECOND COUNT FOR EXTRA WORK—PROVISION FOR ARBITRATION—CONDITION PRECEDENT.**—In respect of a second count in the complaint for extra work, where the contract contains a provision that "should any dispute arise respecting the true value of the extra work done, . . . the same shall be valued by two competent persons, one employed by the owner, and the other by the contractor, and in case they cannot agree, these two to have power to name an umpire, whose decision shall be binding on all parties," such arbitration, or an unsuccessful attempt to secure the same, is a condition precedent, without which the count for extra work and a judgment thereupon cannot be sustained. (Id.)

See Corporations, 1, 10; Husband and Wife, 2-7; Insurance; Interest; Specific Performance; Vendor and Vendee.

CORPORATIONS.

1. **AGREEMENT TO DIVIDE ENTIRE CAPITAL STOCK IS VOID.**—An agreement upon the part of a corporation to divide its whole capital stock amongst its stockholders, is directly violative of the prohibitions of section 309 of the Code of Civil Procedure, and is null and void. The capital stock referred to in that section is the actual property of the corporation contributed by the shareholders. (*Tapscott v. Mexican Colorado River Land Company*, 664.)
2. **SALE OF ENTIRE PROPERTY—DIVISION OF PROCEEDS AMONG STOCKHOLDERS.**—If a corporation, upon the sale of its entire property, divides the proceeds proportionately amongst some of its stockholders, the remedy of a stockholder who has not shared in the distribution is to compel the restoration of the funds thus illegally distributed. He cannot maintain an action against the corporation for a proportionate amount of such proceeds. (Id.)
3. **FOREIGN CORPORATION IS PERSON WITHIN MEANING OF FOURTEENTH AMENDMENT.**—A corporation, although organized under the laws of another state, is a "person" within the meaning of the fourteenth amendment. (*Cal.*—52)

CORPORATIONS (Continued).

teenth amendment of the constitution of the United States, providing that no state shall deprive any person of property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws. (*American De Forest Wireless Telegraph Company v. Superior Court*, 533.)

4. **STATUTE CURTAILING RIGHT TO MAINTAIN OR DEFEND ACTIONS—CONSTRUCTION.**—A statute which purports to curtail the privilege of foreign corporations to maintain or defend actions in this state, and to impose conditions upon compliance with which alone they may be permitted to do so, will not be construed to extend beyond the plain meaning of its terms considered in connection with its object and purposes. (*Id.*)
5. **STATUTE PROHIBITING MAINTENANCE OF ACTION—RIGHT TO DEFEND NOT AFFECTED—FAILURE TO FILE COPY OF ARTICLES OF INCORPORATION—CONSTITUTIONAL LAW.**—Section 410 of the Civil Code, providing that no foreign corporation doing business in this state, which fails to file copies of its articles of incorporation with the secretary of state, and with the county clerk of the county where its principal place of business is located and where it owns property, as required by section 408 of such code, “can maintain any suit or action in any of the courts of this state until it has complied with said section,” does not forbid a foreign corporation which has failed to comply with such provisions from defending an action brought against it in the courts of this state. Notwithstanding the provisions of those sections, to prevent such a foreign corporation from defending any action brought against it, would be to deny it the equal protection of the laws and to deprive it of its property without due process of law. (*Id.*)
6. **FAILURE TO DESIGNATE PERSON FOR SERVICE OF PROCESS.**—Where it appears from the record that a judgment against a foreign corporation was rendered upon its default after striking out its answer, solely for the reason that it had failed to file certified copies of its articles of incorporation as required by sections 408 and 410 of the Civil Code, the action of the court cannot be sustained by reason of the provisions of sections 405 and 406 of that Code, which purport to declare that a foreign corporation doing business in this state, which neglects to file in the office of the secretary of state a designation of some person residing within the state upon whom process may be served, cannot maintain or defend any action or proceeding in the state courts until it has filed such designation. (*Id.*)
7. **ACTION AGAINST STOCKHOLDER—ATTACHMENT OF REAL ESTATE—SALE UNDER EXECUTION—TRANSFER BY DEFENDANT—SUBSTITUTION**

CORPORATIONS (Continued).

NOT PERMISSIBLE.—In an action to enforce the liability of a stockholder, upon a contract by the corporation with plaintiff, in which real estate belonging to the defendant was attached and sold under execution upon a money judgment against defendant, a transfer by the defendant of the attached real estate pending suit, is not such a transfer of an interest in the action, as to entitle the transferee to be substituted as party defendant under section 385 of the Code of Civil Procedure, regardless of the fact whether the service of the summons upon the original defendant was personal, or by publication. (*Anderson v. Schloesser*, 219.)

8. **SUBJECT OF ACTION DETERMINED BY COMPLAINT—NO RIGHT TO JUDGMENT AGAINST TRANSFEREE—SUBJECT NOT AFFECTED BY ATTACHMENT.**—The subject of the action is determined from the complaint, which shows only a right of action against the original defendant, as a stockholder, and no right to any judgment against a transferee of her property. The subject of the action is unaffected by the levy of an attachment, the effect of which is merely to create a lien as security for any judgment that might be recovered against the defendant. (*Id.*)
9. **EFFECT OF DEATH OF NON-RESIDENT DEFENDANT—TRANSFEREE NOT A REPRESENTATIVE—JUDGMENT PAYABLE IN COURSE OF ADMINISTRATION.**—The death of the original non-resident defendant, after her transfer to defendant pending suit, could not confer upon him any right to substitution as her representative. But if there should be administration of her estate in this state, a claim of the demand here sued upon could be presented to her executor or administrator, and be made the basis of a judgment payable in due course of administration, in this action, under section 1512 of the Code of Civil Procedure. (*Id.*)
10. **SALE FOR STOCK—OFFER AND ACCEPTANCE—UNAUTHORIZED INDORSEMENT ON CERTIFICATE OF NON-ASSESSABILITY.**—Where an offer is made to a corporation to sell it certain property for a certain number of shares of its "fully paid and non-assessable stock," a counter offer made by the corporation to buy the property and pay therefor in "fully paid stock," nothing being said about its non-assessability, and its acceptance by the seller, determines the contractual rights of the parties; and the unauthorized indorsement of the words "non-assessable" on the certificates of stock issued in payment for the property, has no effect in determining the rights of the original parties to the contract. (*Campbell v. Santa Maria Oil and Gas Company*, 282.)
11. **ASSESSMENT—DIRECTOR ESTOPPED TO QUESTION VALIDITY.**—A director of a corporation, who voted affirmatively for the adoption of a resolution levying an assessment on the corporate stock, is

CORPORATIONS (Continued).

estopped from questioning its legality. And such estoppel is equally effective against his assignee. (Id.)

See Taxation, 11-17.

COSTS.

COST-BILL—IMPROPER COSTS—MOTION TO RETAX—EXECUTION WRONGFULLY ISSUED—INVOLUNTARY PAYMENT.—Where, pending a motion to retax costs improperly included in the cost-bill, an execution was wrongfully issued and the improper costs collected thereunder, the payment of such costs was not a voluntary payment, though there was no seizure of property of the defendant making the payment; and the entry of the costs in the judgment, and execution thereof being without authority, the court erred in refusing to recall the execution and in refusing to tax the costs. (Kaiser v. Barron, 474.)

See Appeal, 4.

COUNTIES.

1. **COUNTY INDEBTEDNESS—LEGISLATIVE CONTROL—ROAD AND HIGHWAYS OUTSIDE OF MUNICIPALITIES—RECOURSE TO GENERAL FUND.**—It is within the power of the legislature to authorize recourse by a county to its general fund, consisting almost entirely of taxes collected from all parts of the county, for work on its public roads and highways lying outside of the limits of municipalities within the county. Instances of the exercise of such power may be found in sections 2643, 2647 and 2716, of the Political Code. (Johnson v. Williams, 368.)
2. **DOUBLE TAXATION.**—There is no double taxation caused by such an expenditure to the owners of property within a municipality. (Id.)
3. **BONDED INDEBTEDNESS OF COUNTY—CONSTRUCTION OF ROADS, BRIDGES, AND HIGHWAYS.**—Under section 4088 of the Political Code, enacted March 18, 1907 (Stats. 1907, p. 382), authorizing any county to incur a bonded indebtedness for any purpose, for which the board of supervisors are herein authorized to expend the funds of said county, "or for the purpose of building or constructing roads, bridges or highways," a county may issue its bonds, payable by means of a tax levied on all the property of the county, including that within municipalities, for the purpose of building or constructing roads, bridges, or highways; and it is immaterial that there has been no modification or repeal of section 2 of the Highway Act of February 28, 1883, which simply prohibits the inclusion of a municipality within a road district of the county, or the collection therein of the county road poll-tax, or the property tax

COUNTIES (Continued).

for county highway purposes levied annually by the board of supervisors. (Id.)

4. **REPAIRING BRIDGES—GENERAL FUND AVAILABLE FOR.**—Under section 2712 of the Political Code, the board of supervisors of a county are authorized to expend money in the general fund of the county, collected from all parts of the county including municipalities, for repairing bridges, under the circumstances and in the manner provided by that section; and may issue the bonds of the county for the purpose of making such repairs, in pursuance of the authorization contained in section 4088 of that code, to the effect that a bonded indebtedness may be incurred "for any purpose for which the board of supervisors are authorized to expend the funds of said county." (Id.)
5. **DETERMINATION OF SUPERVISORS FOR RESORT TO GENERAL FUND.**—Where the proceedings for the issuance of county bonds for repairing bridges were ordered and instituted by the unanimous vote of the board of supervisors, such action will be taken as a determination by the whole board of the facts authorizing resort to the general fund for such purpose, in compliance with the requirements of section 2712 of the Political Code. (Id.)
6. **PROVISION FOR PAYMENT OF INTEREST—GENERAL TAX LEVY—CONSTITUTIONAL REQUIREMENTS.**—The object of section 18, article XI, of the constitution, providing that no county indebtedness or liability exceeding the income or revenue provided for the year shall be incurred, "unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due," or is simply to insure provision annually, at the time of the general tax levy, for such money as would be necessary to pay interest and principal falling due before the time of the next general tax levy; and a county bond issue is not invalidated by the fact that the payment of interest might be deferred for a short time pending proceedings for the collection of a tax for that purpose already levied, or by the fact that the payment of the first installment of the interest might be deferred until a general tax levy and collection thereunder because it fell due prior to the first general tax levy after the incurring of the indebtedness. (Id.)
7. **EXPENDITURE OF SEVENTY PER CENT OF FUND PRIOR TO JANUARY FIRST—CONSTRUCTION OF COUNTY GOVERNMENT ACT.**—Under section 36 of the County Government Act of 1903 (Stats. 1903, p. 402), whenever, for any and all purposes, in any fiscal year, seventy per cent of a particular county fund has been expended prior to the first of January of that fiscal year, or liabilities to the amount of seventy per cent have been incurred payable therefrom, no more of the fund's money may be expended prior to January first, except

COUNTIES (Continued).

only for the emergency purposes enumerated in that section. (County of Glenn v. Klemmer, 211.)

COURTS. See Holidays; Police Courts; Supreme Court.

CREDITOR'S BILL. See Execution; Insurance, 2, 3.

CRIMINAL LAW.

1. TESTIMONY ON PRELIMINARY EXAMINATION—CROSS-EXAMINATION.—On a trial for grand larceny, proof of the fact that a witness for the prosecution had been sworn on the preliminary examination of the defendant is sufficient to raise the implication that he had testified thereon; and an objection to questions asked such witness on cross-examination in reference to his testimony there given, on the ground that they were "immaterial, irrelevant and incompetent," is insufficient to raise the special points that no sufficient predicate had been laid of the fact that the witness had testified on the preliminary examination, or that there should have been exhibited to the witness his testimony given thereon. (People v. Hart, 261.)
2. PRELIMINARY IMPEACHING QUESTIONS—TESTING CREDIBILITY, MEMORY, AND FAIRNESS OF WITNESS.—On such a trial, after a witness for the prosecution had testified to a certain conversation between the complaining witness and the defendant, questions asked him on his cross-examination, as to whether he had made such statements on the preliminary examination, and why he had not done so, and whether he had then told all he knew about the case, were merely preliminary for the purposes of impeachment, and should have been allowed, although a transcript of the witness's testimony was not first shown him. Such questions were also admissible as testing the credibility, memory, and fairness of the witness. (Id.)
3. ASSAULT BY PERSON UNDERGOING LIFE IMPRISONMENT—CONSTITUTIONAL LAW—PUNISHMENT BY DEATH.—Section 246 of the Penal Code, declaring that "Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death," is not unconstitutional. That section neither denies to such person the equal protection of the law guaranteed by the fourteenth amendment to the constitution of the United States, nor does it contravene the provisions of section 11 of article I of the state constitution, declaring that all laws of a general nature shall have a uniform operation. (People v. Finley, 59.)
4. INSTRUCTIONS AS TO FORMS OF VERDICT—EVIDENCE OF BUT ONE OFFENSE.—In a prosecution under that section, the refusal of the

CRIMINAL LAW (Continued).

court, at the request of the defendant, to instruct the jury that they might render any one of four verdicts according to their conclusion from the evidence,—viz.: guilty as charged in the indictment, guilty of assault with a deadly weapon, guilty of simple assault, or not guilty,—is not error, where the evidence as contained in the record shows that the defendant was either guilty as charged in the indictment or not guilty at all, and the jury were charged that if the evidence did not satisfy them beyond a reasonable doubt that he was guilty of the offense charged, they must find him not guilty. (Id.)

5. **FORM OF INDICTMENT—COURT COMMITTING DEFENDANT.**—An indictment for such crime is sufficiently specific if it charges, in the language of the section, that the defendant was then and there a person confined in and undergoing a life sentence at the state prison. It is unnecessary to charge that he was sentenced to life imprisonment in the state prison by a designated court of competent jurisdiction. (Id.)
6. **EVIDENCE OF COMMITMENT.**—The record of the commitment of the defendant to the state prison was competent evidence for the prosecution on the trial. (Id.)
7. **MURDER—SELF-DEFENSE—EVIDENCE—COTEMPORANEOUS SHOOTING AT ANOTHER.**—Where the defendant charged with murder relied upon self-defense, and it appeared that he killed the deceased while lying in bed, saying when shooting, "You are the first man," and then immediately turned toward another person saying, "You are the next man," who unsuccessfully tried to seize the gun, and was shot in the back while running away, evidence of such cotemporaneous shooting was admissible and relevant, as tending to show an intention to kill them both, and to disprove the claim of self-defense. Such evidence was not rendered inadmissible merely because showing the commission of another crime than the one for which he was being tried. (People v. Manasse, 10.)
8. **CORROBORATIVE EVIDENCE—SHIRTS OF SECOND PERSON SHOT AT.**—The shirts worn by the second person shot at, at the time of the shooting, were admissible in corroboration of his testimony, if they were in a condition to do so, and if not, their admission was harmless. (Id.)
9. **SCOPE OF CROSS-EXAMINATION OF DEFENDANT.**—Although the cross-examination of the defendant must be limited to subjects testified to by him on direct examination, yet within the limits of such subjects, he may be asked any questions tending to shake the effect of his direct testimony. (Id.)

CRIMINAL LAW (Continued).

10. **CROSS-EXAMINATION AS TO THREATS OF DECEASED—FAILURE TO COMMUNICATE THREATS—INFERENCE OF JURY.**—Where the defendant had testified on his direct examination that his wife had told him at various times that the deceased had made threats against his life, he was properly asked on cross-examination whether he had mentioned the threats to any one, to which he answered in the negative. Though he was not bound to tell any one of the threats, the jury might reasonably infer that a person going about in fear of his life, would be apt to mention the cause of his fears to some one. (Id.)
11. **INSTRUCTION AS TO REASONABLE DOUBT—PARAPHRASE.**—Where the court had given the approved instruction as to reasonable doubt, the addition of the words, "a reasonable doubt is a doubt based upon reason, and growing out of the testimony and evidence in the case," is not an incorrect paraphrase of the definition, and does not import that the jury must give a reason for their doubt. (Id.)
12. **MURDER—PLEA OF GUILTY—APPLICATION FOR WITHDRAWAL—DISCRETION.**—Where the defendant charged with an atrocious murder in pursuance of robbery, had, contrary to the advice of several attorneys, and under the advice of his father, pleaded guilty of the crime charged, it was within the discretion of the court, when the defendant was called for sentence to be hanged, to refuse leave at that time to withdraw the plea of guilty and to substitute the plea of not guilty, where there is nothing in the evidence to mitigate the atrocity of the crime. (*People v. Dabner*, 398.)
13. **DISAPPOINTED HOPE—PRIOR GOOD CHARACTER—COLD-BLOODED MURDER NOT MITIGATED.**—Neither the fact that the defendant had hoped to receive a life sentence, if he pleaded guilty, in which he was disappointed, nor the fact that he was young, and had borne a prior good character, could mitigate a cold-blooded, deliberate, and atrocious murder. (Id.)
14. **MURDER—MOTION TO SET ASIDE INFORMATION—DATE OF COMMITMENT—QUESTION OF FACT—PRESUMPTIONS—CONFLICTING EVIDENCE.**—Though an order holding the defendant to answer upon a charge of murder is prerequisite to the filing of the information against him, yet the date of such order is a question of fact to be determined by the trial court, upon a motion to set aside the information; and notwithstanding defendant's counsel testified that the order was not signed when the information was filed, but it purports on its face to be indorsed on the complaint two days prior to the information, the presumptions that official duty was regularly done and that the order was truly dated, constitutes substantially conflicting evidence to the contrary, and the finding of the trial court to the contrary, in denying the motion, is conclusive upon appeal. (*People v. Siemsen*, 387.)

CRIMINAL LAW (Continued).

15. **VOLUNTARY CONFESSION—PRELIMINARY PROOF—QUESTION OF FACT—DISCRETION OF TRIAL COURT—IMPOSSIBILITY OF FIXED RULE.**—Though it is essential that the preliminary proof must show that the confession by the defendant was voluntarily made, without previous inducement or intimidation, yet the question whether such preliminary proof is sufficient to show that the confession was free and voluntary, is one of fact addressed to the trial court, and a considerable measure of discretion must be allowed in the determination thereof. The admissibility of such a confession depends so largely upon special circumstances, that no fixed rule can be formulated covering all cases. (Id.)
16. **STATEMENT OF DEFENDANT UPON CONFESSION OF CO-DEFENDANT.**—The statement of the defendant voluntarily made, while in custody, upon being informed of the confession of a co-defendant voluntarily made by the latter, implicating the defendant with himself, made in the presence of the co-defendant, and admitting the truth of what he said, if shown not to have been induced by fear or promises, was properly admitted in evidence. (Id.)
17. **CONFESSION WHILE UNDER ARREST.**—The mere fact that the confession of defendant was made to a police officer, while under arrest, does not necessarily render it involuntary; nor does the mere fact that the defendant was informed, in the presence of his co-defendant that the latter had confessed, make the defendant's subsequent confession necessarily involuntary. (Id.)
18. **MURDER IN ROBBERY OF BANK—EVIDENCE—POSSESSION AND EXPENDITURE OF MONEY—CORROBORATION OF CONFESSIONS.**—Where it appears that the murder was committed upon a bank officer, in pursuance of a conspiracy by the defendants to rob the bank, which robbery was successfully accomplished, evidence of the sudden possession by the defendants of large sums of money, and expenditures made therefrom, corresponding to the facts stated in the confessions made by the defendants, was admissible in corroboration of such confessions, without necessary preliminary proof that they were impecunious before the robbery. (Id.)
19. **STATEMENT BY DISTRICT ATTORNEY NOT MISCONDUCT.**—It appearing that the alleged confessions by both defendants were admissible in evidence against the defendant, it was not misconduct on the part of the district attorney in his opening statement to refer to the confession made by the co-defendant and to state its purport, and that he would prove it. (Id.)

See Appeal, 5; Physicians and Surgeons.

DAMAGES. See Agency, 4, 5; Husband and Wife, 8-11; Libel, 5; Mines and Mining, 4-6; Office and Officers, 1; Sale, 1-3; Trespass, 4-8.

DEBTOR AND CREDITOR. See Fraud, 1-3; Office and Officers, 2-6.

DEDICATION.

1. PUBLIC SQUARES—PARTITION DEEDS BETWEEN COTENANTS—ADOPTION OF MAP SHOWING SQUARES—DEDICATION—ABANDONMENT TO PUBLIC USE.—Where all the tenants in common of a tract of land made partition deeds thereof, in 1853, adopting a particular map of the town of Oakland, as part of their confirmatory deeds, on which two blocks of the tract were designated as public squares, which the town of Oakland was then in possession and use of as such, and which were excluded from their partition deeds, the adoption of such map by them was the equivalent either of a formal dedication of the land to public use, or at least to an abandonment thereof to such use. (*Casserly v. County of Alameda*, 170.)
2. ADVERSE POSSESSION OF SQUARES BY TOWN, CITY AND COUNTY—PRESCRIPTIVE TITLE AGAINST DEVISEE OF COTENANT.—The adverse, open, notorious, and exclusive possession and use of such public squares, by the town and city of Oakland from 1852 to 1874, and by the county of Alameda pursuant to an act of the legislature, from 1874, when county buildings were erected thereon and maintained by the county adversely to all the world for the further period of more than twenty-nine years, and for twenty-seven years after the patent of the United States was issued to the original owner of the Mexican grant, under whom the cotenants making the partition deeds acquired title, gives the county a perfect prescriptive title in the squares, under the statute of limitations, as against an action thereafter by a devisee of one of its cotenants to quiet title to a fractional share therein. (*Id.*)
3. STATUTE OF LIMITATIONS AGAINST COTENANTS.—The statute of limitations will run in favor of tenants in adverse possession, even as against their cotenants. (*Id.*)
4. STALE DEMAND.—The commencement of the action to quiet title to a fractional interest in the public squares after such a lapse of time, is the presentation of a stale demand, irrespective of the statute of limitations. (*Id.*)

DEED.

1. INTENTION OF PARTIES—BOUNDARY OF MEXICAN GRANT—MONUMENTS—MISTAKES IN COURSES AND DISTANCES—ERRORS IN MAP REFERRED TO.—Where a deed by the owner of a Mexican grant called for its northwestern boundary, on which monuments were placed, but there was a mistake in the field-notes of the survey thereof as to courses and distances thereon, which, if followed, would leave a narrow strip of worthless land shaped like a church spire, and which was followed in a map made by a county surveyor

DEED (Continued).

without survey, showing a mistake in acreage, which was referred to in the deed, and its mistakes inserted therein,—*held*, that it was the real intention of the grantor and grantee that the actual northwestern boundary of the rancho should be the northwestern boundary of the tract conveyed, and that the grantor had no intention of reserving to himself that strip of land. (*Orena v. Newlove*, 136.)

2. **TERMINAL MONUMENTS ON BOUNDARY—COURSES, DISTANCES, AND ESTIMATED QUANTITY CONTROLLED.**—The call in the deed for the boundary of the rancho must be construed as a call for its actual boundary fixed upon the ground by its terminal monuments, which must control any mistakes in courses, distances, and estimated quantity contained in the deed. (*Id.*)
3. **CONSTRUCTION OF PRIVATE DEED AGAINST GRANTOR.**—The construction of a private deed is against the grantor and in favor of the grantee. (*Id.*)
4. **REFERENCE TO COUNTY SURVEYOR'S MAP NOT CONTROLLING.**—Under the circumstances of this case the reference in the deed to the map of the county surveyor, and the adoption of its mistakes in description of boundary and quantity in the deed, is not controlling as to the land intended to be granted by the boundary of the rancho, where said boundary is called for in the deed and also in the map, which contains some reference to monuments, and is controlled as to its mistakes by the monuments known by the parties to exist on the ground. (*Id.*)

See Boundary; Franchise; Gift; Homestead, 1-5; Mistake; Mortgage, 1, 5.

DEPOSITION. See Evidence, 1-4.

DISMISSAL. See Practice.

DIVORCE.

WILLFUL NEGLECT—FAILURE TO SUPPORT WIFE—SUPPORT FROM WIFE'S EARNINGS—DELAY IN COMMENCING ACTION—LACHES.—Under sections 92, 105, and 107 of the Civil Code, a wife is entitled to a divorce on account of the willful neglect of her husband, if for a continuous period of one year prior to her application therefor he neglected to provide for her the common necessities of life, by reason of his idleness and dissipation, and during that period she did not support herself from her own earnings. And the fact that for eight years prior to such period she did support herself from her own earnings is not a ground for denying the divorce. Her failure during such periods to institute a prior action for divorce would not bar her right thereto under sections 124 and

DIVORCE (Continued).

125 of the Civil Code, nor operate to estop her by laches. (*Locke v. Locke*, 56.)

See Husband and Wife, 1.

EASEMENT. See Way.**EJECTMENT.** See Judgment, 2.**ELECTION.**

1. **MUNICIPAL CORPORATIONS—ELECTION TO ANNEX TERRITORY—MARKING OF BALLOTS—GENERAL ELECTION LAW.**—Under the statute of 1889, as amended in 1905, providing for the annexation of territory to incorporated cities and towns, and for the holding of a special election for that purpose, and making the general law applicable, so far as may be practicable, to the ballots used at such election, the opening and closing the polls and the holding and conducting of such election, the counting of ballots, and making of returns by the election board, is not intended to make the general law applicable to the mode of marking the ballots so as to indicate the intention of the voters as to the proposition submitted to them for or against annexation, and they may express such intention by marking the ballot in any manner which will indicate it. (*Haskell v. City of Long Beach*, 543.)
2. **DIRECTION IN NOTICE OF ELECTION NOT MANDATORY.**—A direction in the notice of election that, "to vote, stamp the cross in the voting square," etc., is directory merely, and non-compliance therewith will not invalidate a ballot so long as it appears from any mode of stamping the ballot that the voter has indicated his choice to vote for or against annexation. (Id.)
3. **DISTINGUISHING MARK.**—The failure to stamp the cross in the voting square, and the stamping of the same anywhere between the parallel lines indicating "For Annexation" or "Against Annexation" does not make the cross a "distinguishing mark." (Id.)
4. **LIBERAL CONSTRUCTION OF BALLOT—EFFECTIVENESS.**—The ballot should be liberally construed, and the intendments should be in favor of a construction which will render the ballot effective, rather than one which will, on a technical ground, render it ineffective. (Id.)

See Municipal Corporations, 4.

EQUITY. See Execution; Insurance, 2-4; Specific Performance.

ESTATES OF DECEASED PERSONS.

1. **FAMILY ALLOWANCE BEFORE INVENTORY—CESSATION.**—An order for a family allowance made before the return of the inventory, to commence from the death of the husband, and to continue until further order of the court, ceased to be operative from the date of such return, and no further payments could be allowed under such order. (Estate of Bell, 331.)
2. **PAYMENTS MADE BEFORE ORDER REDUCING ALLOWANCE—CONTEST—APPEAL—ADJUDICATION AGAINST INTERVENING ORDER.**—Where payments made to the widow at the rate of the former allowance after the return of the inventory, prior to a subsequent order reducing the allowance were contested, and disallowed upon appeal, on the ground that there was no intervening order, the judgment upon appeal is an adjudication against the existence of any intervening order. (Id.)
3. **INTERVENING ORDER NOT ENTERED—NUNC PRO TUNC ENTRY—IGNORANCE OF WIDOW—SHOWING NOT PERMISSIBLE—RES ADJUDICATA.**—It cannot be shown to defeat the adjudication by this court that there was no intervening order, that there was in fact such an order containing the same allowance procured by the executrix from the date of the inventory, which was not entered in the minutes of the court, through inadvertence of the clerk, and the existence of which was not known to the widow at the time of the former contest and appeals, and which she afterwards as administratrix procured to be entered *nunc pro tunc*, as of the date of the inventory, to justify the contested payments disallowed upon appeal. (Id.)
4. **DIFFERENCE IN CAPACITY IMMATERIAL.**—The fact that the widow appeared in her individual capacity upon the former appeal, and that the *nunc pro tunc* order under which the court again made the allowances, which were disallowed upon the former appeal, was procured by her in her subsequent capacity as administratrix, is immaterial, and cannot affect the conclusiveness of the judgment upon appeal, against the existence of the intervening order, which involved only her individual rights as widow to the family allowance. (Id.)
5. **COLLATERAL INHERITANCE TAX DETERMINED BY ACT IN FORCE AT DEATH.**—The amount of a collateral inheritance tax to be paid by those succeeding to the estate of a deceased person is to be determined by the statute in force at the time of the death of the deceased. (Estate of Woodard, 39.)
6. **INHERITANCE TAX—CONSTRUCTION OF ACT OF 1905—ESTATES EXCEEDING TWENTY-FIVE THOUSAND DOLLARS—PRIMARY RATES.**—Under section 3 of the Inheritance Tax Act of 1905, where the

ESTATES OF DECEASED PERSONS (Continued).

estate exceeds twenty-five thousand dollars in value, the primary rates imposed on the first twenty-five thousand dollars in section 2 of the act are to be computed, besides the computation upon the excess over that sum, provided for in section 3. The reference in section 3 to section 2 of the act as to primary rates shows the intention of the legislature to charge the primary rates in all cases, whether the estate is less than or exceeds twenty-five thousand dollars in value. (Estate of Bull, 715.)

7. **STRICT CONSTRUCTION OF TAXING LAW—EXEMPTIONS.**—The rule favoring a strict construction of a taxing law, extends also to exemptions, as well as to impositions, and there should be a strict construction against an exemption which would yield absurd, unequal, and unjust results. (Id.)
8. **NUMBERING OF SECTIONS NOT CONTROLLING.**—The numbering of the sections in statutes is a purely artificial and unessential arrangement resorted to for the purpose of convenience only, and can never be allowed to hinder a correct construction of the entire act. (Id.)
9. **INHERITANCE TAX—WIFE'S SHARE OF COMMUNITY PROPERTY LIABLE FOR.**—The surviving wife's share of the community property of herself and her deceased husband is subject to the payment of the inheritance tax imposed by the act of March 20, 1905, prescribing that "All property which shall pass by will or by the intestate laws of this state from any person who may die seized or possessed of the same . . . shall be and is subject to a tax hereinafter provided for." (Estate of Moffitt, 359.)
10. **WIFE TAKES COMMUNITY PROPERTY AS HEIR.**—Upon the death of the husband the wife takes one half of the community property as heir. (Id.)
11. **CONSTRUCTION OF STATUTES—PRIOR JUDICIAL DECISIONS.**—It is a fundamental rule for the interpretation of a statute that it is presumed to have been enacted in the light of such existing judicial decisions as have a direct bearing upon it. (Id.)
12. **CONSTITUTIONAL LAW—PROVISIONS AFFECTING COMMUNITY PROPERTY.**—Under section 14 of article XI of the state constitution of 1849, and the laws enacted thereunder, the wife has no vested estate in the community property, and the inheritance tax law of 1905, in so far as it imposes a tax on community property acquired under that provision of the state constitution is not in conflict with any provision of the state constitutions of 1849 or 1879, or with any provision of the constitution of the United States. (Id.)
13. **INHERITANCE TAX—WIFE'S SHARE OF COMMUNITY PROPERTY SUBJECT TO.**—*Estate of Moffitt, ante*, p. 359, approved, to the effect that a wife's share of the community property is subject to the

ESTATES OF DECEASED PERSONS (Continued).

inheritance tax imposed by the act of March 20, 1905. (Estate of Sims, 365.)

14. **COLLATERAL INHERITANCE TAX—VESTED RIGHT OF STATE—REPEAL OF LAW INOPERATIVE.**—The right of the state to the tax on collateral inheritance, bequests, or devises provided for in the act approved March 25, 1893, and its amendments while in force, vested immediately upon the death of the ancestor, or testator, and its vested rights thereunder to collect or receive any unpaid taxes could not be affected by the repeal of that act and its amendments by the Collateral Inheritance Tax Act of March 20, 1905. (Estate of Martin, 225.)
15. **CONSTITUTIONAL LAW—PROTECTION OF RIGHTS OF STATE.**—Under the limitations prescribed by section 31 of article IV of the constitution, it is not within the power of the legislature, either by the repeal of the law in virtue of which the right of the state to the tax in question vested, or by any other means, to grant or donate it to the successor in estate, or to any other person. (Id.)
16. **FORMER PROCEDURE INSERTED IN REPEALING ACT NOT REPEALED.**—Notwithstanding the express repeal of the act of 1893 and its amendments, the object of the act of 1905 is merely to establish a different amount of taxation and to make it applicable to different persons; and, in so far as provisions of procedure under the former act are found substantially embodied in the latter, they must be deemed mere amendments, within the scope of section 325 of the Political Code, providing that portions of statutes not altered are to be deemed a law from the time when they were first enacted, and such portions apply to taxes previously assessed, the same as if there were no repealing clause in the new act. (Id.)
17. **RE-ENACTMENT NEUTRALIZING REPEAL.**—Where there is an express repeal of a statute, and at the same time a re-enactment of a portion of its provisions, such re-enactment neutralizes the repeal, in so far as the old law is continued in force; and, in such case, the part of the old law re-enacted operates without interruption. (Id.)
18. **IMPROPER CREDITS UPON FAMILY ALLOWANCE—RES ADJUDICATA—RIGHTS OF CREDITORS—APPEAL.**—A creditor who, without further action, rested upon demurrer to a petition seeking credits upon a family allowance, which were contrary to the decision of this court upon a former appeal, but who has appealed from the final judgment upon a transcript identical with that appearing in S. F. No. 4582, *supra*, may avail himself of the former judgment of this court set up by other creditors, which inures to the benefit of all other creditors, as *res adjudicata*; and, since the petition demurred to has no legal existence, such creditor is entitled to a general reversal of the order appealed from, which made an improper

ESTATES OF DECEASED PERSONS (Continued).

- allowance of such credits upon an intervening order adjudged by this court not to exist. (Estate of Bell, 345.)
19. **RIGHT TO DISTRIBUTION AT STATUTORY TIME.**—Ordinarily a legatee, devisee, or heir is entitled as a matter of right to receive his share of the estate at the time fixed by statute, if the same can be given to him without loss to creditors, regardless of the fact that it might be better for all interested in the estate that the property should be held in administration for a longer period. (Estate of Glenn, 77.)
20. **ESTOPPEL TO INSIST ON RIGHT.**—A party entitled to receive a distributive share of the estate can estop himself from insisting upon the right to receive it at the time fixed by the statute where the effect thereof would be to injure the other heirs who had acted upon the faith of such party's undertaking and promises. (Id.)
21. **PARTIAL DISTRIBUTION—RIGHT TO DETERMINE BY EQUITABLE CONSIDERATIONS.**—The superior court, in the exercise of its probate jurisdiction, proceeds upon principles of equity, and may refuse an application for partial distribution where the circumstances of the case show that the claimant, under settled equitable principles, should not be heard to assert the right to immediate possession of the property. In the present case, by reason of the voluntary agreements entered into between the heirs and the financial condition of the estate resulting from the carrying out of such agreements, the application for a partial distribution was rightly refused. (Id.)
22. **PROBATE ORDERS—ENTRY IN MINUTE-BOOK—TIME OF APPEAL—FORM OF ORDER SIGNED BY JUDGE.**—Section 1704 of the Code of Civil Procedure requires probate orders to be entered in the minute-book of the court, and it is the order there entered, and not a separate paper signed by the judge purporting to embody the terms of the order, that is the order of the court, and it is the date of the entry of this order which sets the time running for an appeal. (Tracy v. Coffey, 356.)
23. **CAPTION OF ORDER—OMISSION OF NAME OF COURT.**—In making entries of orders in the minute-book it is not necessary to begin the entry of each order with a statement of the name of the court in which it is made. (Id.)
24. **DISCREPANCIES BETWEEN ORDER AS ENTERED AND DOCUMENT SIGNED BY JUDGE.**—The fact that another memorial exists, consisting of a document signed by the judge and filed with the papers in the case, and that there are some slight discrepancies between such document and the entry in the minute-book, does not affect the validity of the minute entry, nor extend the time of appeal until another entry was made. (Id.)

See Appeal, 12, 15; Wills.

ESTOPPEL.

1. **ACTION TO RECOVER STRIP OF LAND USED AS ALLEY-WAY—LICENSE—FINDINGS—PLEA OF EASEMENT AND ESTOPPEL—FAILURE TO FIND—REVERSIBLE ERROR.**—In an action to recover a strip of land which plaintiffs claimed has been used as an alley-way by mere revocable license, but in which the defendants claimed an easement, and supported the claim by a plea of estoppel resting upon the authorized representations of plaintiffs' agents in selling the property abutting thereon to the defendants, where the court found for the plaintiffs, its failure to find upon the defendants' plea of estoppel where there is substantial evidence to support it, is reversible error, justifying a new trial. (*Banning v. Kreiter*, 33.)
2. **RESERVATION OF ALLEY-WAY FOR BENEFIT OF DAUGHTERS—AUTHORIZED REPRESENTATION TO ABUTTING PURCHASERS—SUPPORT OF ESTOPPEL.**—Where a plaintiff as owner had reserved an alley-way for her daughters, and had authorized her husband to employ real estate agents to sell lots for her, who, with the husband's consent, sold lots abutting thereon, stating the reservation so made, and that the purchasers would have the benefit of that alley-way, and in consideration thereof paid an increased price therefor, the facts show an intended abandonment of the seller's existing right in the alley-way, which will support an estoppel in favor of the purchasers of the abutting property relying thereon. (*Id.*)
3. **EXCEPTION TO GENERAL RULE AS TO REPRESENTATIONS RAISING AN ESTOPPEL.**—When the statement relates to an intended abandonment of an existing right, and is made to influence others, and they have been influenced by it, the case is a recognized exception to the general rule that a representation to constitute an estoppel must relate to an existing fact and not to a matter of opinion, or promise of future performance; and so, when purchases are made upon representations by the seller that abutting property owned by him will be maintained as a public or private way for the benefit of the purchasers, there is an expression of an intended abandonment of a seller's existing right which will support an estoppel, if the purchasers have relied upon it. (*Id.*)

See Agency, 2; Boundary, 4-6; Corporations; Divorce; Estates of Deceased Persons, 20; Husband and Wife, 19; Specific Performance, 5, 6, 9, 17; Wills, 11.

EVIDENCE.

1. **ACTION FOR MONEY BY ASSIGNEE—COMPROMISE OF CROSS-COMPLAINT BETWEEN PARTIES TO ANOTHER SUIT—CONFLICT—VOLUNTARY DISMISSAL—ERROR IN EXCLUDING DEPOSITION.**—In an action by an assignee to recover money alleged to be due to his assignor for money agreed to be paid for compromise of a cross-complaint in another suit, upon dismissal thereof, where the evidence is sharply conflicting as to whether such compromise was made, or
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EVIDENCE (Continued).

the cross-complaint was voluntarily dismissed without promise, it was prejudicial error to exclude an admissible deposition, proving an admission by plaintiff's assignor that he dismissed the suit, because he wanted to, and was glad of it, and never received a cent nor the promise of a cent for it. (*Bollinger v. Bollinger*, 190.)

2. **TAKING OF DEPOSITION—JURISDICTIONAL STEPS COMPLIED WITH—CLERICAL MISPRISION IN FORM OF NOTICE—OBJECTION—WAIVER BY CROSS-EXAMINATION.**—Where the proper jurisdictional steps to the taking of the deposition were complied with, and the proper affidavit, required by section 2031 of the Code of Civil Procedure had been made; but in service of the notice and papers, there was a clerical misprision in omitting the name of the officer before whom the affidavit was made, objection thereto was waived by attendance of the opposing counsel at the taking of the deposition, and taking part in the cross-examination of the witness, notwithstanding a previous preliminary objection to the examination of the witness, on the ground of defect in the notice. (*Id.*)
3. **RULE OF COMMON LAW AS TO STRICT PURSUANCE OF STATUTES ABROGATED IN THIS STATE.**—The rule of the common law that statutes for the taking of depositions in derogation thereof are to be strictly pursued, has no force in this state, by virtue of section 4 of the Code of Civil Procedure. (*Id.*)
4. **OBJECT OF NOTICE—WAIVER—ESTOPPEL.**—Even in jurisdictions where the common law applies, the rule is enforced that the object of notice of the taking of a deposition, where other prerequisites of the statute are complied with, is to secure the opportunity of cross-examination, and that if the opposite party appears and cross-examines the witness, this is a waiver of all defects in the notice, or of the fact that no notice has been served; and he ought not to be heard in such case to say that he had no notice. (*Id.*)
5. **QUESTIONS ALREADY ANSWERED.**—The refusal to permit a witness to answer questions, the subject-matter of which had been covered by her previous testimony, is not error. (*U. S. Oil and Land Co. v. Bell*, 781.)
6. **EXCEPTION MUST BE TAKEN TO EXCLUSION OF EVIDENCE—APPEAL.**—The ruling of the trial court in excluding testimony of a witness cannot be reviewed on appeal where no exception to the ruling was reserved. (*Id.*)
7. **STRIKING OUT EVIDENCE—GROUNDS FOR STATED IN CONJUNCTIVE.**—Where a motion is made to strike out evidence on several grounds stated in the conjunctive, it is not the law that the motion must be denied unless all the objections are well founded. (*Id.*)

See *Contracts*, 5, 9, 10, 12, 17; *Criminal Law*, 1, 2, 4, 6-10, 14-19; *Gift*, 3, 5; *Guaranty*; *Husband and Wife*, 3-7; *Insane*

EVIDENCE (Continued).

Persons, 2; Malicious Prosecution, 3; Mortgage, 1; Negligence, 8, 9; New Trial, 6, 10, 11; Specific Performance, 21-25; Tide-Lands, 4, 5; Trespass, 4-8; Trust, 2-6; Wills, 12, 13, 15, 22-24.

EXECUTION.

1. **CREDITOR'S BILL—PROCEEDINGS SUPPLEMENTARY TO EXECUTION—ADEQUACY OF LEGAL REMEDY.**—In this state a creditor's bill in equity to reach the property of a judgment debtor and subject it to the judgment creditor's claim will not lie when the statutory proceedings supplementary to execution afford an adequate legal remedy. On the contrary, if such supplementary proceedings are inadequate, relief by creditor's bill may still be had. (*Phillips v. Price*, 146.)
2. **SUPPLEMENTARY PROCEEDINGS WHEN INADEQUATE REMEDY.**—Proceedings supplementary to execution are not an adequate remedy whenever they cannot in themselves, without the aid of an independent action, result in subjecting the property, whether tangible or a mere chose in action, to the payment of the creditor's claim. Such condition exists whenever it appears that the person who is charged with holding property belonging to the judgment debtor, or with being indebted to him, claims title to the property or denies the debt. In either case an action is necessary, and the creditor may proceed by creditor's bill without first pursuing the statutory proceeding supplementary to execution. On the other hand, where it does not appear whether or not the person alleged to hold property or to be indebted will claim the property or deny the debt, such proceedings may afford all the relief required and must be pursued. (*Id.*)

See Costs.

FINDINGS.

1. **APPEAL FROM JUDGMENT—FINDINGS OF ULTIMATE AND PROBATIVE FACTS.**—Upon an appeal on the judgment-roll alone, a judgment based upon allegations and findings of sufficient ultimate facts cannot be successfully assailed merely because the complaint and the findings contain in addition a showing of probative facts which, taken alone, might not support the judgment. (*Corea v. Higuera*, 451.)
2. **ULTIMATE WHEN CONTROLLED BY PROBATIVE FACTS.**—Findings of probative facts can be used to overcome an express finding of the ultimate fact only where the probative facts found are inconsistent with the ultimate fact found, or where it appears that the trial court made the alleged finding of ultimate fact simply as a conclusion from the particular facts found. (*Id.*)

See Agency, 4; Appeal, 8, 9; Contract, 16, 17; Estoppel, 1; Gift, 2, 4; Specific Performance, 1; Wills, 1.

FORCIBLE ENTRY. See Trespass, 2.

FOREIGN LAW. See Franchise, 5, 6; Negligence, 11-14.

FRANCHISE.

1. **STREET RAILROAD—GRANT OF RIGHT, TITLE, AND INTEREST.**—An instrument whereby the grantor grants "his right, title and interest in and to and under" certain street-railroad franchises in a municipality, is a transfer of the estate or property rights created by the original grant of the franchises and not merely of the document containing the grant. (*O'Sullivan v. Griffith*, 502.)
2. **FRANCHISE IS INCORPOREAL HEREDITAMENT.**—The right to use the streets of a city as a way upon which to build and operate a street railroad is a right in real property, an incorporeal hereditament. (*Id.*)
3. **GRANT EQUIVALENT TO QUITCLAIM DEED—WANT OF TITLE IN GRANTOR.**—A grant whereby the grantor purports to convey only his right, title, and interest in certain street-railroad franchises, with no covenants of title, is in effect a mere deed of quitclaim, and in the absence of fraud or mistake, the grantee is not relieved from the obligation of paying the purchase price merely because the grantor had no title to the franchises. The same rule would obtain if the grant were regarded merely as a transfer of the instruments by which the franchises were granted. (*Id.*)
4. **COVENANT OR WARRANTY—RECITAL IN GRANT—FRANCHISE "DULY GIVEN."**—The law will not imply a covenant or warranty that the franchises purporting to be conveyed were valid from a mere recital in the instrument of transfer that they had been "duly given" to the grantor and his assignors. A covenant or warranty is never implied from a mere recital. Words sufficient to create an agreement are essential. (*Id.*)
5. **LAW OF FOREIGN STATE—PRESUMPTION.**—In the absence of proof to the contrary, it is presumed that the law of another state respecting the transfer of a street-railroad franchise, is the same as the law of this state. (*Id.*)
6. **PRESUMPTION APPLIES TO STATUTORY LAW.**—The presumption in this state as to the similarity of the laws of a foreign state applies to statute law as well as to the common law. (*Id.*)
7. **TRANSFER OF STREET-RAILROAD FRANCHISE.**—In this state a street-railroad franchise may be transferred whether held by a corporation or a natural person, and no formal or express consent of the state is necessary. And in the absence of proof to the contrary, the law of Nevada is presumed to be the same. (*Id.*)
8. **CONSENT OF STATE NOT NECESSARY TO TRANSFER.**—A provision in a grant of a street-railroad franchise requiring the grantee to form

FRANCHISE (Continued).

a corporation to build and operate a street-railroad and to cause corporate bonds to be issued to the grantor in payment for the franchise, is not contrary to public policy or of such effect as to make the entire contract void. (Id.)

See Mandamus, 1.

FRAUD.

1. FRAUDULENT CONVEYANCE—FUTURE CREDITORS—DEED OF GIFT.—A deed of gift may be void because made with intent to enable the grantor to defraud future creditors, but to be so, it must be fraudulent in its inception, made with the specific intent to defraud future creditors. (Schell v. Gamble, 448.)
2. FRAUDULENT INTENT QUESTION OF FACT.—The question of such fraudulent intent as to future creditors is one of fact and not of law, and the burden of proof is upon the complaining creditor to show that the conveyance was made with such intent. (Id.)
3. CONFLICT OF EVIDENCE.—Where the evidence is conflicting as to whether a deed of gift was executed in fraud of future creditors, a finding upholding the deed will not be disturbed. (Id.)
4. TROVER—CONVERSION OF LUMBER—FRAUD IN PROCURING SALE—TRANSFER WITHOUT VALUE—NOTICE—AVOIDANCE OF TITLE—PLEADING—EVIDENCE.—In an action of trover for the conversion of lumber, when the complaint contains the usual averments, and the defendant denies plaintiff's ownership and the conversion, the plaintiff, without pleading that the property was acquired by a third party by fraud in procuring the sale thereof from plaintiff, and was transferred by him to the defendant without consideration, and with notice of the fraud, may prove these facts in avoidance of the title, as between the original parties, and as against the defendant, where the action was promptly brought. (Wendling Lumber Co. v. Glenwood Lumber Co., 411.)
5. EFFECT OF FRAUD IN SALE—TITLE FOR CERTAIN PURPOSES—ELECTION—DEFRAUDED PARTY.—The fraudulent sale passed the title sufficiently to protect a *bona fide* purchaser without notice of the fraud, and sufficiently to be confirmed in case of such long acquiescence and unreasonable delay by the party defrauded as to suggest the inference of his consent; though by prompt action of the vendor, upon discovery of the fraud he may elect to treat the sale as void, both as against the original purchaser, and as against a fraudulent vendee with notice. (Id.)
6. ELECTION OF REMEDIES BY DEFRAUDED PARTY.—The defrauded party may elect between the civil remedies of trover, replevin in the *cepit*, replevin in the *detinet*, or trespass. (Id.)

FRAUD (Continued).

7. **FRAUD NOT A PART OF CAUSE OF ACTION—ORDER OF PROOF.**—The cause of action, in the remedy shown, does not rest upon fraud. The fraud comes in technically not as a part of the plaintiff's *prima facie* case, but by way of reply to any claim of the defendant resting upon the sale; yet this is a mere matter of order of proof. (Id.)
8. **SUFFICIENCY OF PROOF OF FRAUD—PRESUMPTION—CONFLICTING EVIDENCE.**—The presumption of law is in favor of honesty and fair dealing, where there are no confidential relations; and the evidence of fraud must be more than sufficient to raise a suspicion. It is held that the evidence on the question of fraud was such as to make the decision of the trial court in the matter conclusive upon this court. (Id.)

See Agency, 5; Contracts, 12, 13; Gift, 2, 3; Guardian and Ward, 2, 3; Malicious Prosecution, 1, 2; Specific Performance, 17, 29.

GIFT.

1. **DEED OF GIFT—POSSESSION RAISES PRESUMPTION OF DELIVERY.**—A deed of gift which is in the possession of the grantees is presumed to have been delivered, and the burden is on the grantor, seeking to invalidate such deed for want of delivery, to rebut this presumption. (Zihn v. Zihn, 405.)
2. **DELIVERY QUESTION OF FACT—EVIDENCE—FINDING.**—The question of the delivery of the deed is one of fact to be determined by the trial court, and where the evidence is substantially conflicting, the finding of the trial court is conclusive. In this case, the finding that the deed in question was delivered is held sustained by the evidence, as is also the finding that it was untainted by fraud. (Id.)
3. **DEED FROM FATHER TO DAUGHTER—CONFIDENTIAL RELATIONS—PRESUMPTION OF FRAUD—EVIDENCE TO REBUT PRESUMPTION.**—In an action to set aside a deed of gift from a father to his daughters on the ground of fraud, any presumption of fraud arising from the admitted allegations of the complaint respecting the confidential relations of the parties may be rebutted, and the effect of the presumption, if any is raised, is merely to throw upon the donees the burden of showing that the gift was made freely and voluntarily, with full knowledge of all the facts, and with perfect understanding of the effect of the transfer. This requirement the donees in the present case have complied with, and the validity of the deed is not affected by a further finding that at the time of its delivery the parties agreed that the grantor should have a life estate in the property, and that the grantees should become the owners in fee subject to such life estate. (Id.)

GIFT (Continued).

4. **FINDINGS AS TO PROBATIVE FACTS.**—In such an action, where judgment is rendered in favor of the defendants, it is immaterial that the evidence is insufficient to sustain certain findings relative to probative facts, which are of such a nature that a finding in favor of plaintiff thereon could not affect the clear and specific findings of ultimate facts in favor of the defendants. (Id.)
5. **EVIDENCE—QUESTION ALREADY ANSWERED.**—The refusal to allow a witness on his direct examination to answer a question is not prejudicial error, if the subject-matter of the inquiry had already been fully covered in the prior examination of the witness. (Id.)
6. **DELIVERY—RELEASE OF DOMINION AND CONTROL—GIFTS CAUSA MORTIS.**—A gift is a transfer of personal property made voluntarily and without consideration, and a verbal gift is not valid unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery. The delivery must be absolute, that is, the donor must not only part with the possession of the property, but must relinquish to the donee all dominion and control over it. These requirements hold true of all gifts, whether they be gifts *inter vivos* or gifts *causa mortis*. If the transfer of such dominion and control is postponed to some future date, as until the date of the death of the donor, it becomes thereby no more than an unexecuted and unenforceable promise to make a future gift. (*Beebe v. Coffin*, 174.)
7. **DISTINCTION BETWEEN GIFTS CAUSA MORTIS AND INTER VIVOS.**—The single vital distinction between a gift *causa mortis* and a gift *inter vivos* is that the former, being in its nature testamentary, is subject to the donor's revocation while he lives. (Id.)
8. **DELIVERY OF RELEASE OF MORTGAGE—INCOMPLETE GIFT.**—A mortgagee inclosed a release and satisfaction of the mortgage in a sealed envelope, and delivered the same to the mortgagor, who had no actual knowledge of what the envelope contained, with instructions which limited its taking effect until after the death of the mortgagee. During the life of the mortgagee, the envelope remained in his safe deposit box, subject to his call. *Held*, that the facts were insufficient to establish a gift *causa mortis* of the mortgage indebtedness. (Id.)

See Fraud, 1-3; Husband and Wife, 3, 14; Trust.

GRANTOR AND GRANTEE. See Deed; Mines and Mining, 1, 2; Specific Performance; Vendor and Vendee.

GUARANTY.

1. **GUARANTY TO BANK—PERCENTAGE OF ALL DRAFTS BY FRUIT COMPANY—BILLS OF LADING—ORANGE SEASONS—EXPLANATORY EVI-**

GUARANTY (Continued).

DENCE.—A guaranty by the defendant to a bank of ninety per cent of all drafts drawn thereupon by a fruit company, with bills of lading attached, during two orange seasons, is not so plain and unambiguous upon its face that evidence is not admissible in explanation of it. (*First National Bank of Redlands v. Bowers*, 95.)

2. SUFFICIENCY OF EXPLANATION—SUPPORT OF VERDICT FOR DEFENDANT.—*Held*, that the explanatory evidence introduced by the defendant to show that the guaranty was not of ninety per cent of each draft drawn, but that the bank in allowing the fruit company to draw ninety per cent of each draft was to retain the surplus as a security fund to the end of each fruit season, and that she was only to be liable for ninety per cent of the face of all drafts drawn during the season, was sufficient, if believed by the jury, to support a verdict for the defendant. (*Id.*)

GUARDIAN AND WARD.

1. TESTAMENTARY GUARDIAN—CONSENT OF MOTHER TO APPOINTMENT BY FATHER.—Under section 241 of the Civil Code providing that "A guardian of the person or estate, or of both, of a child born, or likely to be born, may be appointed by will or by deed, to take effect upon the death of the parent appointing: 1. If the child be legitimate, by the father, with the written consent of the mother,"—the consent of the mother to a guardian appointed by the will of the father may be given after the death of the father. (*Guardianship of Baker*, 537.)
2. RESIDENCE OF MINOR—CONCLUSIVENESS OF FINDING—FRAUD OR MISTAKE.—In a proceeding for the appointment of the guardian of a minor, a finding that the minor was a resident of the county in which the proceeding was instituted is of a jurisdictional fact and is conclusive, in the absence of fraud or mistake. (*Id.*)
3. VACATING ORDER OF APPOINTMENT—FINDING—APPEAL—SPECIFICATION OF PARTICULARS.—In a proceeding to set aside an order appointing a guardian of a minor, on the ground of fraudulent representations as to his residence, a finding negating the allegations of fraud will not be reviewed on an appeal from an order refusing to vacate the appointment, when the bill of exceptions contains no specifications of the particulars wherein the evidence is insufficient to justify the finding. (*Id.*)

HABEAS CORPUS. See Physicians and Surgeons, 2.

HOLIDAYS.

1. LEGAL HOLIDAYS—CONSTITUTIONAL LAW—TRANSACTION OF JUDICIAL BUSINESS.—Section 5 of Article VI of the constitution, declaring that the superior courts of the state "shall be always open

HOLIDAYS (Continued).

(legal holidays and non-judicial days excepted)," but "injunctions and writs of prohibition may be issued and served on legal holidays and non-judicial days,"—authorizes the legislature to allow or disallow the transaction of all or any class of judicial business upon legal holidays, by an act not in itself obnoxious to other restrictions of the constitution. (*Diepenbrock v. Superior Court of the County of Sacramento*, 597.)

2. **SPECIAL HOLIDAYS—AMENDMENT OF 1907 TO SECTION 135 OF CODE OF CIVIL PROCEDURE UNCONSTITUTIONAL.**—That portion of the amendment of section 135 of the Code of Civil Procedure, enacted at the special session of the legislature on November 23, 1907, and providing that on all "special holidays" declared by the governor of the state, the courts shall be open for the transaction of all judicial business "except the trial of an action or the rendition of a judgment based upon a contract, expressed or implied, for the direct payment of money," is unconstitutional in that it confers a special privilege upon a class, not founded upon any constitutional, rational, or legal distinction. The exception is so integral a portion of the statute as to render the entire amendment void. (*Id.*)

HOMESTEAD.

1. **DEED OF TRUST TO SECURE DEBT NOT AN ABANDONMENT.**—Where a homestead has been regularly selected the subsequent execution of a deed of trust by the husband and wife to secure the payment of a debt, though in the form of a grant, is not a "grant" within the meaning of section 1243 of the Civil Code providing the manner for the abandonment of the homestead, but is practically and substantially a mortgage with a power of sale, and does not constitute an abandonment of the homestead. (*MacLeod v. Moran*, 97.)
2. **EFFECT OF LEGAL TITLE IN TRUSTEES.**—In such case the legal title in the trustees is conveyed solely for the purpose of security, and carries no other incident of ownership than the right to convey upon default, but leaves a legal estate in the trustor or his successors as against all persons other than the trustees and those lawfully claiming under them. (*Id.*)
3. **HOMESTEAD MAY BE SELECTED AFTER DEED OF TRUST.**—A trustor in possession may select as a homestead property covered by a deed of trust to secure his debt. (*Id.*)
4. **EFFECT OF PAYMENT OF DEBT—CESSATION OF ESTATE OF TRUSTEES—TITLE OF RECORD COMPELLABLE.**—Upon the payment of the debt secured by a deed of trust the estate of the trustees absolutely ceases, leaving in them nothing but the bare legal title of record, which they may be compelled to reconvey to the owner to make the record title clear. The reconveyance is no part of the execution of the trust. (*Id.*)

HOMESTEAD (Continued).

5. **CONSTRUCTION OF CLAUSE IN DEED OF TRUST—ABANDONING HOMESTEAD.**—A clause in a deed of trust to secure a debt purporting to abandon all right of homestead is to be construed only as an abandonment to the trustees for the purposes of the trust, and not as divesting the homestead right absolutely. No such express abandonment to the trustees was necessary to enable them to convey the whole property free of claim of homestead to a purchaser at a trustees' sale had in execution of the trust, and the express abandonment can have no further effect. (Id.)
6. **LANDS HELD BY TENANCY IN COMMON.**—In this state, land held by tenancy in common or joint tenancy cannot be selected or claimed as a homestead. (U. S. Oil and Land Co. v. Bell, 781.)

HUSBAND AND WIFE.

1. **NON-RESIDENT WIFE MAY MAINTAIN ACTION FOR MAINTENANCE.**—Under section 137 of the Civil Code, a non-resident wife may maintain an action in this state against a resident husband for permanent support and maintenance when she has cause for a divorce against him under section 92 of that code. (Hiner v. Hiner, 254.)
2. **POWER TO TRANSMUTE SEPARATE PROPERTY INTO COMMUNITY PROPERTY.**—A husband and wife may by contract transmute the separate property of either into community property. (Title Insurance and Trust Company v. Ingersoll, 1.)
3. **ACTION BY WIFE TO ENFORCE TRUST—CONTROL BY HUSBAND OF WIFE'S PROPERTY—PRESUMPTION OF TRUST—BURDEN OF PROOF.**—In an action by the wife to enforce a trust against the husband in respect of her separate property, the mere fact that the husband, with her consent, had the management and control of her separate property, does not show any intention on her part to make a gift thereof to the husband, or to change it into community property. The presumption in such case is that it continues to be her separate property, and that the husband takes the *corpus* or principal of such property in trust for the wife; and the burden of proof is upon the husband to show an intended change by the wife in the *status* of her property. (Id.)
4. **EXPRESS AGREEMENT NOT ESSENTIAL—CIRCUMSTANTIAL PROOF—SUPPORT OF FINDINGS FOR HUSBAND.**—It is not essential, in order to support findings for the husband, that the understanding between the husband and wife was that her separate money delivered to him should be treated as community property, and that the wife converted it into community property, that the husband should show an express agreement to that effect on the part of the wife. The change in the *status* of the property may be shown by the nature of the transaction, or appear from surrounding circumstances, if clearly evincing the intention of the wife to change such *status*. (Id.)

HUSBAND AND WIFE (Continued.)

5. **DEPOSIT OF WIFE'S MONEY TO CREDIT OF HUSBAND'S ACCOUNT IN BANK—EVIDENCE OF HUSBAND—USE AS COMMUNITY PROPERTY.**—The evidence of the husband that the bulk of the money derived from sales of the wife's separate property, was deposited by the wife to the credit of the account of the husband in a local bank, where he kept his money, and that he drew from the same in payment of all general expenses of himself and wife, and for purposes of investment of property in his own name, and that it was generally understood between them, without express words, that this was a common fund, to be used indiscriminately for the benefit of the community, and that it was so treated for fifteen years, without objection by her or demand for an accounting, is sufficient, notwithstanding opposing circumstances, to sustain the finding in favor of the husband. (Id.)
6. **TRACING OF WIFE'S MONEY INTO REAL ESTATE.**—Where the record shows, without conflict, that some of the money of the wife that came into the hands of the husband, was clearly traced into other property, a finding that none of the money could be traced is not fully sustained. If there was no change in the *status* of her separate property, and a portion of it can be clearly traced, she is entitled to the relief asked in respect thereto. (Id.)
7. **PREJUDICIAL ERROR IN TESTIMONY FOR HUSBAND—EVIDENCE OF GOOD CHARACTER.**—Where the evidence in support of the finding rested almost entirely upon the testimony of the husband, and there was no evidence impeaching his good character, and the case, viewed in the light most favorable to defendant, was a close one on the facts, in consideration of the burden of proof resting upon him, it was prejudicially erroneous, against the plaintiff's objection, to admit the testimony of witnesses for the husband to his good character for truth, honesty and integrity. (Id.)
8. **ACTION FOR DEATH OF WIFE—MALPRACTICE OF PHYSICIAN—PLEADING—HEIRSHIP OF HUSBAND.**—In an action by a husband to recover damages for the death of his wife, alleged to have been caused by the negligent malpractice of the defendant as her physician, the complaint need not expressly aver that the husband is the heir of his deceased wife, where it is alleged that she was his wife at the time of her death. (*Groom v. Bangs*, 456.)
9. **CERTAINTY OF CAUSE OF ACTION.**—The cause of action is not uncertain. It is neither for injury to the wife nor to the husband in her lifetime; but is one cause of action only for damages to the husband as heir of the wife, for a negligent injury causing her death. (Id.)
10. **AMENDED AND SUPPLEMENTAL COMPLAINT—NEW CAUSE OF ACTION—DISCONTINUANCE—DEMURRER WITHOUT OBJECTIONS—APPEARANCE—WAIVER OF IRREGULARITY.**—Where the original complaint was by

HUSBAND AND WIFE (Continued).

husband and wife for damages for bodily pain and injury caused by the alleged negligent and unskillful treatment of her by the defendant; and an amended and supplemental complaint stated a new cause of action by the husband alone for the negligent and unskillful treatment of the defendant causing her death, the filing of the same, was, in effect, a discontinuance of the former action, and the beginning of a new action for a new cause. Where the defendant, without objection, appeared to the new cause of action, and demurred to the new pleading, the irregularity in the mode of the procedure was waived; and objection thereto cannot be urged upon appeal for the first time. (Id.)

11. **SURVIVORSHIP OF ORIGINAL CAUSE OF ACTION—IMMATERIAL QUESTION.**—The question whether or not the original cause of action survived to the husband on the death of the wife is immaterial. The original complaint was not before the court, and the sufficiency of the amended complaint upon demurrer, as to the right of the plaintiff to maintain the cause of action therein stated, is to be determined solely by its own allegations without reference to those in the original complaint. (Id.)
12. **TITLE IN WIFE—CONSTRUCTION OF CODE—PRESUMPTION—AMENDMENT NOT RETROACTIVE—COMMUNITY PROPERTY.**—The amendment to section 164 of the Civil Code in 1889, creating a presumption in favor of separate property where title is taken in the wife's name, is not retroactive; and where the deed was taken in the wife's name prior to that amendment the presumption is that she held it as community property, and the deed alone cannot show the contrary. (*Nilson v. Sarment*, 524.)
13. **SEPARATE PROPERTY OF WIFE.**—In such case, in order to constitute the property so taken in her name the separate property of the wife, it must be shown either that it was purchased with her separate funds, or that it was given to her by the husband. (Id.)
14. **GIFT BY HUSBAND—FINDING AGAINST EVIDENCE.**—Where the court found upon sufficient evidence that the property lived upon by husband and family and taken in the wife's name, was acquired with community funds paid for by the husband; but further finds that the property was given to her by the husband, the latter finding must be deemed against the evidence where the husband, without conflict, testified that he bought it for a home, and did not intend to make a gift thereof to the wife, and no circumstances appear sufficient to justify the inference that it was her separate property, or to overcome the presumption that it was community property. (Id.)
15. **CIRCUMSTANCES NOT OVERCOMING PRESUMPTION.**—The circumstances that the deed described the land as encumbered by a mortgage, to be paid by the grantee, where it was in fact fully paid by the

HUSBAND AND WIFE (Continued).

husband with community funds, and that the property was insured in the wife's name, and the loss was made payable to her, and that deeds of trust were executed by husband and wife to secure loans, with a proviso for re-conveyance to the wife, were none of them sufficient to overcome the presumption that the record title left in the wife's name, was community property. (Id.)

16. **EFFECT OF INSURANCE IN WIFE'S NAME.**—Where the house and lot standing in the wife's name was not her separate property, the assumption that the insurance money was payable to her in the event of loss by fire, would not make the money her separate property, any more than the burnt house was such. (Id.)
17. **TERMINATION OF DEEDS OF TRUST.**—The provision for reconveyance, or any reconveyance actually made, could have no legal effect otherwise than to make the record title clear, since upon payment of the debt, the purposes of the trust ceased and the property at once, without a reconveyance, reverted in the party or parties who had owned it before. The record title left in the wife, is no evidence that she held it otherwise than as community property. (Id.)
18. **CLAIM OF SEPARATE PROPERTY BY WIFE—PURPOSE OF SALE—OBJECTION BY HUSBAND.**—The claim by the wife that the property was hers, and that she was about to sell it, and the objection of the husband that she could not sell it unless he signed the deed, cannot be construed as an admission on his part that the land was her separate property, or that she had the right to sell it. (Id.)
19. **HUSBAND NOT ESTOPPED AGAINST WIFE'S GRANTEE—PROVISION FOR SURPLUS ON SALE BY TRUSTEE.**—The husband is not estopped as against the grantee of the wife by a mere provision in the deeds of trust that in case of sale by the trustees, the surplus, if any, should be paid to the wife, from claiming the property as community property against such grantee, where the latter knew that his grantor was a married woman and was bound to ascertain, at his peril, whether the property was community property, and he did not rely upon any statement made by the husband, but relied upon the wife's warranty of title in her deed, it being matter of common knowledge that such deeds are unusual in this state. (Id.)

See Divorce; Guardian and Ward.

IDEM SONANS. See Insane Persons, 3.

INFANTS. See Guardian and Ward.

INHERITANCE TAX. See Collateral Inheritance Tax, 5-17.

INJUNCTION.

PICKETING BY LABOR UNION—FINDING UNSUPPORTED BY EVIDENCE.—In an action brought by a manufacturing corporation against a labor union and some of its officers and members to obtain an injunction restraining the defendants from interfering with the plaintiff in the conduct of its business by stationing pickets in the neighborhood of plaintiff's place of business, or otherwise molesting or interfering with any person or persons transacting business with the plaintiff, where the evidence entirely fails to show that the pickets had ever come in contact with or influenced any one desiring to deal with the plaintiff as a customer, and had not been stationed at or near the plaintiff's place of business for a week prior to the commencement of the action, a finding that such pickets "are still engaged in the acts complained of" is not sustained by the evidence, and an order refusing the defendants a new trial asked for on that ground will be reversed. (*Crescent Feather Co. v. United Upholsterers' Union*, 433.)

See Water and Water-Rights, 5-10.

INSANE PERSONS.

1. **LIABILITY FOR CARE IN STATE HOSPITAL.**—An action may be maintained by a state hospital by its treasurer, against an insane person confined therein under a regular order of commitment, who owns property, to recover judgment for his care, support, and maintenance, under the act of the legislature, known as the "Insanity Law," approved March 31, 1897. (*Napa State Hospital v. Dasso*, 698.)
2. **EVIDENCE—REGULARITY OF COMMITMENT—COLLATERAL ATTACK—PRELIMINARY STEPS—PRESUMPTION.**—Upon a collateral attack upon the order of commitment, in such action, made many years subsequent to the order, which shows upon its face that the examination was had while the insane person was before the judge at the hearing, it is unnecessary to prove the requisite preliminary steps, but it will be presumed in the absence of contrary proof, that such steps were regularly had. (*Id.*)
3. **NAME OF PERSON COMMITTED AND PERSON SUED—PRESUMED IDENTITY—DIFFERENCE IN SPELLING—IDEM SONANS.**—Where the commitment was of "Emanuel Tasso," and the person sued was "Emanuello Dasso," and it appears that the difference in the given name was merely the difference between the English and Italian method of spelling, the court properly treated the surnames as *idem sonans*. (*Id.*)
4. **ACTION BROUGHT UNDER ACT OF 1897 UNAFFECTED BY REPEAL.**—Where the action was brought under the act of 1897 it was unaffected by the repeal of that act pending suit, there being an express reservation of pending actions previously commenced, which

INSANE PERSONS (Continued).

- must be prosecuted to final determination in the manner and form in which it was brought. (Id.)
5. **CONSTITUTIONAL LAW—SPECIAL LEGISLATION AS TO PRIVATE CORPORATIONS—PUBLIC CORPORATIONS UNAFFECTED.**—The provisions of the constitution forbidding the organization of private corporations by special legislation are inapplicable to the formation of public corporations organized for governmental purposes, and which are state agencies, subject to the control and government of the state. (Id.)
 6. **CONSTITUTIONALITY OF INSANITY ACT.**—The Insanity Act of 1897 is constitutional and valid. The right conferred therein upon state hospitals to recover for the care and maintenance of insane persons confined therein, is not special or class legislation. (Id.)
 7. **RESTORATION TO CAPACITY—CONSTRUCTION OF CODE—GUARDIANSHIP.**—The provisions of section 1766 of the Code of Civil Procedure, respecting the restoration of an insane person to capacity, are not applicable to one who has been confined in an insane asylum without having been put under guardianship. (*Aldrich v. Barton*, 488.)
 8. **CERTIFICATE OF DISCHARGE FROM STATE HOSPITAL—WANT OF AUTHORITY—COLLATERAL ATTACK.**—A certificate of discharge from a state hospital by an official having jurisdiction to make it, under section 2189 of the Political Code, is made by that section evidence of an adjudication that the person discharged had recovered; but it is open to collateral attack for want of authority to make it, and it may be shown that when it was made the apparently discharged person was not an inmate of the hospital, nor within the control of the superintendent when the certificate was made; and upon such showing, the certificate is ineffectual for any purpose. (Id.)
 9. **TRUST UNDER WILL—CONSTRUCTION—ACTUAL RECOVERY FROM MENTAL INCOMPETENCY.**—Where a trust under a will provided for title in trustees to provide an income for the support of an insane person, "so long as he shall be incompetent to hold and properly manage his affairs and property," the principal to be turned over to him upon his restoration "to mental soundness and capacity," the trust is to be construed as continuing until the actual recovery, *in fact*, from mental derangement or incompetency, rather than the mere making of an order purporting to declare such recovery. (Id.)
 10. **CERTIFICATE PRIMA FACIE EVIDENCE.**—A certificate of discharge granted under the act of 1897 (Stats. 1897, p. 331), or under the act of 1901 (Stats. 1901, p. 639), is merely *prima facie* evidence of sanity, and may be overcome by proof to the contrary. (Id.)
 11. **RIGHT TO TERMINATE TRUST UNDER WILL—PROOF REQUIRED—SUPPORT OF FINDING.**—In order to terminate the trust under the will the discharged person must prove restoration to a condition of

INSANE PERSONS (Continued).

competency in fact to manage his affairs. On this issue, the finding of the court was against him, and is supported by sufficient evidence. (Id.)

INSTRUCTIONS. See Contracts, 13; Criminal Law, 4, 11; Libel, 3, 5; Negligence, 10.

INSURANCE.

1. **LIFE INSURANCE—ASSESSMENT PLAN—TRUST FUND—"CONTRACT HOLDERS"—CONSTRUCTION OF STATUTE—DEBENTURE CONTRACTS—OPTIONS.**—Under the provisions of the law of 1891 (Stats. 1891, p. 126), regulating life insurance by corporations formed to carry on the business of "mutual insurance on the assessment plan," and requiring the deposit of a secured trust fund, the securities for which were to be deposited with the state treasurer, and the principal sum was to be "held in trust for the contract holders of such corporation," the term "contract holders" imports holders of contracts of life insurance, and does not include general creditors, or holders of "debenture contracts," who have loaned money thereto, with mere options at maturity to take a life annuity, or, if in health, a paid up policy, and who have no interest in the trust fund, until all holders of insurance have been paid therefrom. (Engwicht v. Pacific States Life Assurance Company, 183.)
2. **ACTION BY HOLDER OF INSURANCE TO CHARGE FUND—CREDITORS' BILL—NECESSARY PARTIES—ACTION BY COURT—INTERPLEADER.**—All holders of contracts of insurance are entitled to share ratably in the trust funds; and they are all necessary parties to a distribution thereof, which cannot be had except upon a bill in equity in the nature of a creditor's bill. One of them may invoke the aid of equity in enforcing his demand, but the court, with the corporation defendant and its books before it, should determine what other persons are entitled to share in the trust fund, and invite or compel their presence and participation by interpleader. (Id.)
3. **POWER OF COURT UPON HEARING OF CREDITOR'S BILL—DISTRIBUTION OF FUND—RECEIVER.**—Upon the hearing of the creditor's bill, with all the parties interested in the fund before it, the court may make equitable distribution of the funds, and may appoint a receiver to carry that distribution into effect. (Id.)
4. **SUBSTITUTE METHOD NOT PERMISSIBLE.**—The method adopted by the courts, of appointing a receiver at the instance of one party, with a command to all persons claiming any interest in the fund to appear and show cause within sixty days, is not a permissible substitute for bringing them all in as necessary parties to the distribution. (Id.)

INSURANCE (Continued.)

5. **TITLE INSURANCE—RECORD TITLE—TENURE OF OCCUPANTS EXCEPTED—TITLE BY ADVERSE POSSESSION NOT INSURED AGAINST.**—Where a policy of title insurance, by its terms, only insured the record title to the property, and expressly excepted the "tenure of the present occupants," a title to a portion of the property acquired by adverse possession, is not insured against, and constitutes no breach of the covenant of title set forth in the policy. (*Bothin v. The California Title Insurance and Trust Company*, 718.)
6. **ACTION FOR BREACH OF COVENANT—DEFECTS IN TITLE—TITLE OF ADVERSE CLAIMANTS QUIETED—TRUST-DEED BY STRANGER TO RECORD TITLE.**—In an action to recover damages for alleged breaches of the covenants in such policy of title insurance, for specified defects in the title, there can be no recovery either for the expense of defending an action to quiet title in which adverse occupants of a portion of the property prevailed, nor can a deed of trust executed by a stranger to the record title, constitute a defect in the record title insured against. (*Id.*)
7. **EFFECT OF RECORDING ACT.**—The provisions of section 1213 of the Civil Code, that every conveyance of real property acknowledged and recorded is from the date of recordation constructive notice to subsequent purchasers and mortgagees, are inapplicable to a conveyance by one who is not in any manner connected with the title of record. (*Id.*)
8. **LIFE INSURANCE—ASSESSMENT INSURANCE—PROVISION FOR INCREASE OF RATE OF PREMIUM.**—A provision in a certificate of life insurance, issued by an assessment life insurance association, that the "rate of the mortuary premiums may be changed to correspond with the actual mortality experience of the association," is an unequivocal declaration of the reserved right of the company to increase its premiums as the exigencies of its business may require. (*Schmierer v. Mutual Reserve Fund Life Association*, 208.)

INTEREST.

1. **EXCESSIVE INTEREST UPON INTEREST—WHOLE INTEREST AVOIDED—CONSTRUCTION OF CODE.**—Under section 1919 of the Civil Code, providing that "the parties may, in any contract in writing whereby any debt is secured to be paid, agree that if the interest . . . is not punctually paid, it shall become a part of the principal, and thereafter bear the same rate of interest as the principal debt," a provision in the note secured, signed by the adverse party, making the unpaid interest on interest bear a greater rate than that of the principal sum secured, renders the whole interest void in its entirety, and not merely as to the excess of the rate agreed upon, and the judgment must be modified in so far as it allows such illegal interest. (*Bell v. San Francisco Savings Union*, 64.)

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INTEREST (Continued).

2. **SEVERANCE OF ILLEGAL FROM LEGAL INTEREST.**—Where the allowance of illegal interest continued during the maturity of the note and an agreed extension thereof, but the note provided that after maturity of the principal any unpaid principal and interest shall bear the same increased rate, such provision is legal; and in modifying the judgment there must be a severance of the illegal from the legal interest, and only the former can be deducted from the judgment. (Id.)

See Mortgage, 11.

INTERPLEADER. See Insurance, 2.

IRRIGATION DISTRICT. See Taxation, 5-10.

JUDGMENT.

1. **VACATION OF JUDGMENT OTHER THAN ONE RENDERED—ERROR OF CLERK—COURT'S POWER OF CORRECTION AFTER SIX MONTHS.**—Where the clerk of the court, at the request of defendants' attorney, entered a judgment different from that rendered by the court, the error is clerical, and not judicial; and the court has power to vacate it, on plaintiff's motion, at any time, and has inherent power to correct it so as to conform to the judgment rendered, notwithstanding the lapse of six months, which period has no application to the case. (City and County of San Francisco v. Brown, 644.)
2. **EJECTMENT—JUDGMENT OF NONSUIT—DISMISSAL—TITLE NOT DETERMINED—JUDGMENT NO BAR TO SECOND ACTION.**—A judgment of nonsuit rendered in an action of ejectment, on motion of the defendants, decides nothing on the merits of the case, and determines nothing as to the title of plaintiff, or defendants; but it simply operates as a dismissal of the case for want of sufficient proof as to the title of the plaintiff, and is not a bar to a subsequent action by the plaintiff upon the same cause of action. (Id.)
3. **EFFECT OF JUDGMENT AS RES ADJUDICATA—NEW EVIDENCE.**—A final judgment is conclusive not only as to matters judicially determined, but also as to every matter that might have been litigated; and the subject-matter involved cannot be re-litigated, in a subsequent proceeding, on the ground of newly discovered evidence. (Estate of Bell, 331.)

See Appeal, 2, 3, 6, 8, 16; Corporations, 7-9; Partition; Partnership, 3, 4; Practice, 1-5; Specific Performance, 7.

JURISDICTION. See Appeal, 2, 7, 15; Certiorari; Prohibition; Slander; Wills, 11.

JURY AND JURORS. See Wills, 18-20.

LACHES. See Tenants in Common.

LAND. See Adverse Possession; Agency, 1-3; Recording; Tide-Lands; Title to Land.

LIBEL.

1. FALSE CHARGE OF OFFICIAL CORRUPTION AGAINST CANDIDATE FOR RE-ELECTION—PRIVILEGED COMMUNICATION NO DEFENSE.—The publication of a false charge against a candidate for re-election to office, that while in office he was guilty of official corruption, in soliciting and accepting personal benefits as a consideration to influence his official acts, as a member of a city council, is libelous *per se*; and there is no privileged communication under the code, or general law, which will exempt the defendant publishing such charge, from responsibility for falsehood. (*Dauphiny v. Buhne*, 757.)
2. TRUTH OF CHARGE THE ONLY JUSTIFICATION.—A libel is no more justifiable when published against a candidate for public office, than if published of him on any other occasion. Though the publication of the truth is justifiable; yet the publication of a falsehood finds no justification whatever under the law. The law does not permit the character of those seeking position to be destroyed under any guise of privileged publication. One can justify the publication of a libel against a candidate for public office upon privilege, only by proof that the accusation is true. (*Id.*)
3. ERROR IN INSTRUCTIONS—PRIVILEGE—LIBELOUS CHARGE.—It was error to instruct the jury that the publication was privileged, where there was no evidence to sustain it, but the facts and circumstances connected with the publication negated the existence of such privilege. The question being one of law, it was the court's duty, if requested, to instruct the jury that the publication was not privileged. The court also erred in refusing to instruct the jury that the article set forth in the complaint was libelous upon its face. (*Id.*)
4. FAILURE TO PROVE PLEA OF JUSTIFICATION—AGGRAVATION.—The court also erred in refusing to instruct the jury that where the defendant reiterates the alleged libelous charges in his answer, and offers no evidence to prove their truth, if the jury were satisfied that it is made with a knowledge of its falsity and maliciously, and not in good faith, such plea of justification is an aggravation of the wrong done to the plaintiff, and may be considered by the jury in assessing damages. (*Id.*)
5. QUESTION OF DAMAGES—WANT OF MALICE—ERRONEOUS INSTRUCTION.—There is responsibility for actual and substantial damages

LIBEL (Continued).

for loss of reputation, etc., even where there is no actual malice. What the responsibility should be is a question for the jury under instruction explicitly declaring the rule under which it should be ascertained. It was error to instruct the jury, that "if an honest mistake is made in an honest attempt to enlighten the public it must reduce the damages to a minimum, if the fault itself is not serious, and there should be no reasonable responsibility where there is no malice." (Id.)

6. **ERRORS IN EVIDENCE—DUTY OF APPELLANT—ABSENCE OF REFERENCE TO TRANSCRIPT.**—It is the duty of counsel for appellant properly to index the transcript, and to point out therein the rulings of the court objected to in the admissibility of evidence, upon which he relies as erroneous; and where he fails to enlighten the court in his argument, as to where the alleged errors may be found, it will be assumed that they were not deemed of sufficient importance to undertake the task; and this court will not assume the burden of doing it. (Id.)

See Slander.

LIFE INSURANCE. See Insurance, 1-4, 8.

MALICIOUS PROSECUTION.

1. **SUFFICIENCY OF COMPLAINT—MALICE—WANT OF PROBABLE CAUSE—CRIMINAL CONVICTION PROCURED BY FRAUD.**—Though, to sustain a malicious prosecution, both malice and want of probable cause must be alleged; yet the averment of a criminal conviction is not inconsistent with the averment of want of probable cause, where it is alleged to have been obtained by fraud of the defendants, and their use of evidence known to be perjured and by their intimidation and coercion of the jury to render a false verdict against the plaintiff. (Carpenter v. Sibley, 215.)
2. **EXTRINSIC FRAUD NOT REQUIRED.**—The rule that only extrinsic fraud can be shown to set aside a judgment, does not apply to the case of a malicious prosecution and conviction of the plaintiff without probable cause, alleged to have been procured directly by fraud and perjured testimony, and unfair conduct on the part of the defendants. (Id.)
3. **ERRONEOUS EXCLUSION OF EVIDENCE.**—Where the complaint states a cause of action for malicious prosecution, it is erroneous to exclude evidence in support of the cause of action alleged. (Id.)

MANDAMUS.

1. **STREET-RAILROAD FRANCHISE—DISCRETION OF CITY COUNCIL—ADVERTISEMENT OF APPLICATION.**—Under the act of March 22, 1905, regulating street railroad and other franchises in counties and

MANDAMUS (Continued).

municipalities, the mayor and common council of a municipality have discretion whether or not to advertise an application for a street-railroad franchise, and to determine whether or not the franchise or privilege shall be granted at all, the only purpose of the act in this regard being to prevent the granting thereof in any other manner than that prescribed. *Mandamus* will not lie to control the discretion of the governing body of the municipality, as to whether they will advertise an application for such franchise. (*McGinnis v. Mayor and Common Council of the City of San Jose*, 711.)

2. **WRIT OF MANDATE NOT ANTICIPATORY.**—A writ of mandate cannot be issued which shall be effectual only in the event that the inferior tribunal or board shall subsequently determine a matter then pending before it in a certain way. The act which will be compelled must be one to the performance of which the complaining party is entitled at the institution of his proceeding; and it is the refusal or neglect to perform an act which is enjoined by the law as a present duty, that serves as the foundation for the proceeding. (*Id.*)

See *Office and Officers*, 1; *Partition*, 5.

MAPS. See *Recording*.

MASTER AND SERVANT. See *Negligence*, 6-10, 16-20.

MEASURE OF DAMAGES. See *Damages*.

MECHANICS' LIENS.

1. **CONSTRUCTION OF RAILROAD—LETTING OF HORSES AND HARNESS TO CONTRACTOR—LESSOR NOT ENTITLED TO LIEN.**—One who has let horses and harness belonging to him to one who has contracted to build a railroad, at a stipulated price per month, the contractor having full control thereof during the hiring and having employed and paid the drivers thereof, cannot be held to have bestowed any labor upon the railroad, or to be entitled to enforce any lien thereon, as against the owner, under section 1183 of the Code of Civil Procedure, as a subcontractor. (*Wood, Curtis & Company v. El Dorado Lumber Company*, 230.)
2. **LABOR ENHANCED BY USE OF APPLIANCES—RENT OF APPLIANCES.**—Though, in proper cases, the value of labor may be enhanced by the use of tools and appliances, and the laborer may claim a lien for said value; yet this rule has no application where one merely rents appliances to another who labors on the structure, in which case, it can never be said that he has himself bestowed labor on that structure within the meaning of our law. (*Id.*)

MINES AND MINING.

1. **CONSOLIDATED PLACER MINERAL LOCATION—CONVEYANCE OF SPECIFIC PORTION OF CLAIM—DISCOVERY OF OIL BY GRANTEE—EFFECT OF DISCOVERY ON BALANCE OF CLAIM.**—Where eight persons, as associates, enter upon and locate a tract of one hundred and sixty acres of vacant, unoccupied mineral lands of the United States under the placer mining laws, mark the boundaries of the consolidated claim, and proceed with the work of development to make an oil discovery, but before any discovery of oil had been made by them they all join in conveying a specific portion of the consolidated claim to a third person, who prosecutes the work of discovery on the portion so conveyed, and subsequently makes a sufficient discovery of oil thereon, the effect of such conveyance, in the absence of any contrary understanding or agreement between the parties, is to surrender to the grantee all of the rights which the grantors formerly enjoyed in the portion conveyed, and to constitute it a separate and independent claim; and the subsequent discovery of oil thereon by such grantee would not inure to the benefit of such associates or their grantee of other portions of the consolidated claim, so as to perfect the location of the remaining portions of the consolidated claim. (*Merced Oil Mining Company v. Patterson*, 624.)
2. **AGREEMENT MAKING WORK BY GRANTEE OPERATE FOR BENEFIT OF ENTIRE CLAIM—CONSIDERATION—PAROL EVIDENCE.**—If as a part of the consideration of the deed by the associates to the specific portion of the consolidated claim it was understood and agreed between the parties that the labor done and money expended by the grantee on the portion conveyed should operate for the benefit of the land remaining in the possession of the associates, such effect will be given it, and the value of the work and the resulting discovery would then inure to the benefit of the land remaining in the possession of the associates, and of all their subsequent grantees. That such an agreement was part of the consideration of the deed may be shown by parol. (*Id.*)
3. **HYDRAULIC MINING—OBSTRUCTION OF STREAM—INJURY TO LAND BY DEBRIS—LACK OF NEGLIGENCE.**—An hydraulic miner, who places a bar in the course of a natural stream, and above the same deposits his mining debris, so as to cause a portion of the land of a riparian proprietor to be washed away, and the remaining portion to be covered with detritus, is liable for the resulting damage, irrespective of any question of negligence; and the fact that the miner uses all the care for the protection of the riparian proprietor's land consistent with the conduct of his mining operations is immaterial. (*Salstrom v. Orleans Bar Gold Mining Company*, 551.)
4. **EVIDENCE OF DAMAGE.**—In the present case, the evidence is reviewed and held to sustain the verdict of the jury as to the

MINES AND MINING (Continued).

amount of damage inflicted on the plaintiff's land by the wrongful acts of the defendant. (Id.)

5. **LAND AVAILABLE FOR MINING AND AGRICULTURE—MEASURE OF DAMAGES.**—The use of land for hydraulic mining, causing a destruction of the upper soil, and its use for agricultural purposes, are necessarily incompatible; and where land available for both of such uses is injured, the utmost that the owner can claim is that the amount of injury be determined upon the basis of the availability of the land for the most valuable use for which it can be used. (Id.)
6. **ELEMENTS DETERMINING MEASURE OF DAMAGES.**—Where land, a portion of which is available exclusively for hydraulic mining purposes, and the balance of which is available for such purposes and is also available for and used for agricultural purposes, is injured by being covered with mining debris, the true rule as to the measure of damages is this: 1. The value of the growing crop destroyed; 2. As to the land available exclusively for mining purposes, if the cost of repairing the injury by removing the debris would amount to less than the value of the property as it was prior to the injury, such cost would be the proper measure of damage, but if such cost would exceed such value, then the value of the property would be proper measure. As to the land used for agricultural purposes, if such land had a greater value for mining purposes than agricultural purposes, the same rule would apply as in the case of the other land, but if more valuable for agricultural purposes, and it was absolutely destroyed for such purposes, the value of the land is the proper measure. (Id.)

MINORS. See Guardian and Ward.

MISTAKE.

1. **REFORMATION OF DEED—MUTUALITY OF MISTAKE AS TO DESCRIPTION OF LAND—SUFFICIENCY OF PROOF—CONFLICT.**—In an action to reform a deed for mutuality of mistake as to the description of the land, caused by the mistake of a draughtsman carried into the deed, giving the defendant about sixteen acres more land than was contemplated by the parties, although the proof of the mistake and its mutuality must be clear and convincing, yet a mere conflict in the evidence, does not necessitate a denial of the relief, but the court's finding of the mistake and its mutuality, upon conflicting evidence, if well supported by sufficient evidence, will not be disturbed, notwithstanding the denial of the mistake by the defendant, who is seeking to hold more than he is justly entitled to. (Home and Farm Company of California v. Freitas, 680.)
2. **ERRONEOUS DESCRIPTION BY METES AND BOUNDS—EXCESS OF ACREAGE—SPECIFIC AND DIFFERENT VALUATIONS.**—Though a description

MISTAKE (Continued).

of land in a deed by metes and bounds conveys the legal title to all the land included therein, yet a court of equity is not precluded from reforming the deed so as to express the true intent of the parties, where there is an excess of acreage, and it is clearly shown, throughout, that the tracts and parcels of the land were not valued as a whole, but were specifically and differently valued in acreage valuation in accordance with the quality and location of the land. (Id.)

3. **SEGREGATION OF LAND ERRONEOUSLY CONVEYED—PLEADING AND PROOF.**—Where the specific tract of land decreed to have been erroneously conveyed is supported by the complaint showing just what the error in the deed was, and the exact description of the land erroneously conveyed, and by the evidence clearly showing the specific acreage and its *situs*, as pleaded, the court properly decreed the reformation of the deed in relation thereto. (Id.)
4. **DEMAND FOR CORRECTION OF DEED BEFORE SUIT.**—A sufficient demand for the correction of the deed before suit, is shown by a request for a correction deed, reconveying the property, made by the engineer and surveyor of the plaintiff upon the defendant, and its refusal by him, upon the ground that no mistake had been made. (Id.)

MORTGAGE.

1. **ACTION TO REDEEM FROM DEED INTENDED AS MORTGAGE—PAROL EVIDENCE—SUFFICIENCY OF PROOF—CONFLICT—REVIEW UPON APPEAL.**—In an action to redeem from a deed absolute upon its face alleged to have been intended as a mortgage, parol evidence is admissible to prove such intention. Although the rule is that such evidence must be clear and convincing to change the character of the deed, yet, whether the evidence offered is clear and convincing, is a question for the trial court; and where the plaintiffs' evidence was sufficiently clear and convincing to satisfy that court, notwithstanding conflicting evidence to the contrary by numerous unimpeached witnesses for the defendants, its decision in favor of the plaintiffs is not subject to review upon appeal. (Couts v. Winston, 686.)
2. **MORTGAGE INDEBTEDNESS—APPLICATION FOR LOAN—REQUEST ACCED-ED TO—IMPLIED PROMISE.**—An indebtedness is essential to a mortgage, and where it appears that application had been made for a loan from defendants by the plaintiffs, and the defendants acceded to the request, and the deed was intended to secure the same, it cannot be urged that there was no direct evidence of a promise by plaintiffs to repay the loan, as such promise is implied in fact as well as in law. (Id.)
3. **LEASE—RENTAL EQUIVALENT TO INTEREST—LOAN FROM SISTER TO PAY MORTGAGE AND OTHER DEBTS—PROMISE OF QUITCLAIM.**—Where

MORTGAGE (Continued.)

the loan was from plaintiff's sister to pay a mortgage on home property and other debts, and the transaction was in the form of a deed, and a lease for a year at a rental equivalent to interest, and a promise to reconvey if the principal loan was repaid within the year, and a promise of a quitclaim by plaintiffs, if unable to pay, the intention being to avoid foreclosure proceedings, the promise to quitclaim shows an intention of plaintiffs to retain an equity which would not be lost by the mere failure to repay the loan within the time specified in the lease; and the court properly held that the transaction was in effect a mortgage to secure the loan, and that plaintiffs were entitled to redeem therefrom after the expiration of the lease. (Id.)

4. **FORECLOSURE OF MORTGAGE—DEATH OF MORTGAGOR BEFORE MATURITY—STATUTE OF LIMITATIONS.**—Where a mortgagor died before the maturity of the note and mortgage, the statute of limitations does not begin to run until letters of administration are issued upon his estate, regardless of the lapse of time prior thereto. (*Hibernia Savings and Loan Society v. Farnham*, 578.)
5. **PRIOR UNRECORDED DEED—MORTGAGE FOR VALUE—PRIOR RECORD—RUNNING OF STATUTE OF LIMITATIONS.**—Where there was a prior unrecorded deed from the mortgagor of which the mortgagee had no actual knowledge when parting with value, the mortgage being first recorded, the statute of limitations cannot begin to run in favor of the grantee, until his deed is recorded. (Id.)
6. **DECISION UPON FORMER APPEAL—FAILURE TO FIND UPON PLEA OF STATUTE—LAW OF CASE INAPPLICABLE.**—A decision upon a former appeal reversing the case for failure of the court to find upon the issue of a plea of the statute of limitations in favor of the grantee of the mortgagor, is not the law of the case, where the court finds upon a new trial upon sufficient evidence based upon appropriate allegations on the part of the mortgagee, of want of notice of the conveyance by the mortgagor, prior to the record thereof, that the action is not barred in favor of the grantee. (Id.)
7. **TAX ON MORTGAGE INTEREST—PAYMENT OF TAX BY GRANTOR OF MORTGAGOR—LIABILITY OF MORTGAGEE.**—A purchaser of real property, which was subject to a lien for unpaid taxes assessed on the interest of a mortgagee thereof under a mortgage executed by his grantor, who subsequently pays the tax for the purpose of releasing the land from the lien, cannot recover the amount so paid from such mortgagee, as there was no contractual relation existing between them. Even if the rule were otherwise, it could not operate to impose a liability on the original mortgagee who had assigned the mortgage upon which the tax was assessed prior to the date on which the tax became a lien. (*William Ede Company v. Heywood*, 615.)

MORTGAGE (Continued.)

8. **FORECLOSURE OF MORTGAGE BY SECOND PLEDGEE—FIRST PLEDGEE MADE DEFENDANT—CROSS-COMPLAINT—OBJECTION TO PARTIES BY VENDEE OF MORTGAGOR.**—The second pledgee of a note and mortgage, though not the holder thereof, has such an interest therein as entitles him to foreclose the same, where the first pledgee who is the holder thereof is made a party to the action. The grantee of the mortgagor is not entitled to object that the first pledgee is made a party defendant and not joined as co-plaintiff. But such objection is obviated where the first pledgee files a cross-complaint to foreclose the mortgage, thus virtually uniting in the foreclosure. (*Patten v. Pepper Hotel Company*, 460.)
9. **EXERCISE OF OPTION BY HOLDER TO DECLARE PRINCIPAL SUM DUE—RIGHT OF SECOND PLEDGEE TO FORECLOSE—INUREMENT OF BENEFIT.**—Where the first pledgee as holder of the note and mortgage, has exercised an option given in the mortgage to declare the principal sum due for non-payment of interest, the exercise thereof inures to the benefit of the second pledgee of the note and mortgage as plaintiff, and an allegation made in the complaint that such option has been exercised by the first pledgee, as holder, entitles the plaintiff to claim such option by suing to foreclose the mortgage. (*Id.*)
10. **TIME OF ELECTION BY HOLDER OF NOTE—PLEADING—ADMISSIONS—FINDING UNNECESSARY.**—Where both the complaint of the plaintiff, and the cross-complaint of defendant bank as holder, each avers that because of default in the payment of the interest on the mortgage note they had both elected to exercise the option provided for therein, and had declared the whole of said note due and payable, and such averments are admitted by failure to deny them specifically, no finding was required to be made upon the matter so admitted. (*Id.*)
11. **TENDER OF INTEREST SUBSEQUENT TO EXERCISE OF OPTION.**—Tender of interest subsequent to the exercise of the option could not affect such exercise, or raise any issue thereon. (*Id.*)
12. **CONSIDERATION OF NOTE AND MORTGAGE—ATTACK BY VENDEE OF MORTGAGOR.**—Where the maker of the note and mortgage was not a party to the action to foreclose the mortgage against his grantee, who as part of the purchase price assumed payment of the indebtedness to the pledgees, such grantee cannot as against them assail the note and mortgage for want of original consideration. (*Id.*)
13. **ATTORNEY'S FEES ON FORECLOSURE—DISCRETION.**—The amount to be allowed as attorney's fees on the foreclosure of a mortgage, rests peculiarly in the discretion of the court. (*Id.*)
14. **BASIS OF AWARD OF FEES.**—The extent of the responsibility which an attorney assumes by reason of the amount involved in the foreclosure proceedings which he is conducting, and his actual

MORTGAGE (Continued).

services therein are to be considered, for the purpose of fixing the compensation. (Id.)

See Gift, 8; Quieting Title, 2, 3; Specific Performance, 8, 9; Statute of Limitations, 3.

MUNICIPAL CORPORATIONS.

1. **BONDED INDEBTEDNESS—ACT OF FEBRUARY 25, 1901—PURPOSES FOR WHICH BONDS MAY BE ISSUED.**—Under the act of February 25, 1901 (Stats. 1901, p. 27), authorizing the incurring of indebtedness by municipal corporations, municipal bonds cannot be issued except for a purpose for which the ordinary revenues of the city might be lawfully expended. (*City of San Diego v. Potter*, 288.)
2. **STREETS, HIGHWAYS AND BOULEVARDS—BONDS MAY BE ISSUED FOR BUILDING—PARK AND BOULEVARD ACT.**—The building and construction of streets, highways, and boulevards are objects for which the legislative body of a city or town may, in their discretion, expend the ordinary revenues of the city (*Vrooman Act*, sec. 26), and for that reason fall within the purposes for which bonds may be issued under the act of 1901, and are also included in the term "street work" used in said act, which means "work upon a street," either in repairing or making it. And bonds of the municipality may be issued for these purposes under the act of 1901, notwithstanding the existence of the Public Park and Boulevard Act of March 19, 1889 (Stats. 1889, p. 361). If, however, there be included with these authorized purposes an unauthorized purpose, for the whole of which a single aggregate sum is specified, it is impossible to separate the good from the bad, and the whole must fall. (Id.)
3. **LAND FOR STREETS, HIGHWAYS, AND BOULEVARDS—CITY OF SAN DIEGO.**—The city of San Diego, under the provisions of its charter, and the general laws of the state thereby made applicable to such matters, to wit, the act of 1889, p. 70, and the act of 1903, p. 376, is authorized to pay the whole cost of land to be used for roads, streets, highways, or boulevards from the ordinary revenues of the city, if they deem the improvement of such general benefit to the city that the whole city constitutes the district to be benefited thereby, and may issue municipal bonds therefor, under the act of 1901, notwithstanding the existence of the Public Park and Boulevard Act of March 19, 1889. (Id.)
4. **SUBMISSION OF UNAUTHORIZED PROPOSITION—ELECTION.**—Under the act of 1901, the mere submission of a proposition to incur a bonded indebtedness for a purpose not authorized by the act at an election held under the act, does not have the effect to invalidate the election as to all other authorized propositions then submitted. (Id.)

MUNICIPAL CORPORATIONS (Continued.)

5. **PUBLIC PARK**.—Under the act of 1901, a municipality has the power to incur a bonded indebtedness for the purpose of acquiring land for a public park. (Id.)
6. **DESIGNATION OF ACT UNDER WHICH BONDS ARE ISSUED**.—Where the provisions of the act of 1901 as to notice, etc., were literally complied with in the proceedings leading up to the issuance of the bonds, such proceedings were not invalidated for the failure of the city council to designate in the ordinance calling the election, or in some order or record prior to the election, whether the bonds proposed for boulevards and parks were to be issued under the Park and Boulevard Act of 1889 or the general act of 1901. There is nothing in the law requiring such designation. (Id.)
7. **SERIAL PAYMENT OF BONDS—ORDER OF PAYMENT**.—Where a certain indebtedness authorized by the electors was for the sum of \$59,108.55, a subsequent ordinance providing that such indebtedness should be evidenced by one hundred and nineteen bonds, one hundred and eighteen of which should be of the denomination of five hundred dollars and one of \$108.55, the five-hundred-dollar bonds to be numbered from 1 to 118 consecutively, and the \$108.55 to be numbered 119, and also that "three of said bonds shall be due and payable annually . . . the order of payment beginning with the smallest numbered bond and continuing from the less to the greater until all of said bonds shall have been paid," is in compliance with section 5 of the act of 1901, requiring the legislative body of the municipality to provide for the annual part payments of the bonds in sums not less than one-fortieth part of the whole amount of the indebtedness. (Id.)
8. **PROPOSAL OF CITY COUNCIL FOR LIGHTING OF CITY—FLEXIBLE METHOD PROPER**.—In performing the duty of a city council to provide the city with adequate lights, it is not required, in its proposal for bids, to fix the absolute number of lights required, which might be increased or diminished according as the population of the city might be increased or diminished; but it was proper to call for bids for a supply of lights of a designated character and candle-power, burning for a designated time, at so much per week or month for each light required by the city, which is the usual method adopted by municipal corporations. (Cady v. City of San Bernardino, 24.)
9. **REQUIREMENT OF CHECK FOR BENEFIT OF CITY ENDED BY CONTRACT—UNTENABLE SUIT BY TAXPAYER**.—The object of the requirement of a ten-per-cent check accompanying a bid is for the benefit of the city, to avoid possible loss in the event that the successful bidder should refuse to enter into the contract; and where the contract is entered into the purpose of the requirement is at an end. A taxpayer cannot, after the contract is let under a proper method, maintain a

MUNICIPAL CORPORATIONS (Continued).

suit to avoid it, either on account of the method employed or for the insufficiency of the required check for ten per cent of the bid, whatever objection he might have made for such insufficiency before the contract was let. (Id.)

See Counties; Election; Office and Officers; Police Courts; Schools; Taxation, 2-4; Tide-Lands.

MURDER AND MANSLAUGHTER. See Criminal Law, 7-19.

NEGLIGENCE.

1. **DANGEROUS PUSH-CAR LEFT UNGUARDED—KNOWN USE BY CHILDREN—INJURY TO BOY—SUFFICIENT COMPLAINT.**—A complaint by a young boy of twelve years of age for injuries alleged to have been sustained by the negligence of the defendants in leaving a push-car unguarded and unlocked standing on rails on a public street, which alleges that children were accustomed to play thereon with the knowledge and consent of the defendants, and that plaintiff had his foot crushed while endeavoring to stop the car while in motion, states a cause of action, and a general demurrer thereto was improperly sustained. (Cahill v. E. B. & A. L. Stone & Co., 571.)
2. **DUTY TO USE ORDINARY CARE TO PREVENT INJURY TO CHILDREN—IMPUTED KNOWLEDGE.**—Those who place an attractive but dangerous contrivance in a place frequented by children, and knowing or having reason to believe that children will be attracted to it and subjected to injury thereby, are chargeable with knowledge that they are usually unable to foresee, comprehend, and avoid the danger into which they permit them to be allured, and owe the duty to use ordinary care to prevent injury to them. (Id.)
3. **CONTRIBUTORY NEGLIGENCE PRECLUDED ON DEMURRER.**—Where the complaint alleged that the plaintiff was too young and inexperienced to foresee the danger, the question of contributory negligence on his part is precluded, where the defendants rest upon their demurrer to the complaint. (Id.)
4. **AGE OF ACCOUNTABILITY FOR CONTRIBUTORY NEGLIGENCE—QUESTION OF FACT.**—There is no precise age at which, as matter of law, a child is to be held accountable for all his actions to the same extent as one of full age. There is no conclusive presumption that a twelve-year-old boy was able to foresee the danger attending his action which led to his injury, as against an admitted averment to the contrary. The question is one of fact, to be shown by the evidence. (Id.)
5. **CONTRIBUTORY NEGLIGENCE MATTER OF DEFENSE.**—Contributory negligence is matter of defense where it does not appear upon the face of the complaint, or by the evidence for the plaintiff. (Id.)

NEGLIGENCE (Continued).

6. **MASTER AND SERVANT—PLEADING—ALLEGATIONS AS TO LEGAL DUTY OF DEFENDANT.**—In an action by an employee against his employer to recover damages for personal injuries alleged to have been occasioned by the latter's negligence, mere allegations of the legal duty of an employer to his employees in the matter of furnishing suitable tools and appliances, and keeping the same in proper repair, tender no issue of facts, and the failure to deny them in the answer in no way affects the determination of the case, which must be determined upon the facts admitted or proved, in the light of the law as settled by the statutes and decisions. (*Sterne v. Mariposa Commercial and Mining Company*, 516.)
7. **DIFFERENT THEORIES OF LIABILITY—FAILURE TO FURNISH SUITABLE APPLIANCES.**—In such an action, where the plaintiff sought to hold the defendant liable upon the theory that it had failed to use reasonable care in the matter of furnishing suitable appliances to the plaintiff with which to work, and also upon the theory that it had negligently sent him, without warning, to work in a dangerous place, and it is impossible to determine from the record upon which theory the jury rendered a verdict against the defendant, a reversal will be ordered, if any prejudicial error was committed by the trial court in regard to the issue relative to the furnishing of suitable appliances. (*Id.*)
8. **EVIDENCE—CROSS-EXAMINATION—MOTION TO STRIKE OUT.**—On the trial of such action, the plaintiff, on his direct examination, testified as to the mechanical appliances that were and were not on the premises where he was working, and described their construction. On cross-examination, he was asked where he acquired the information he had given respecting such appliances. In response, against the defendant's protest and motion to strike out, he was permitted to answer that he was told by a certain person, who was an employee of the defendant, having charge of part of the machinery, that if a certain different appliance had been used he never would have been hurt. *Held*, that the answer was not responsive to the question, and that the refusal to strike it out was prejudicial error. (*Id.*)
9. **DESIGNATION OF EVIDENCE TO BE STRICKEN OUT.**—The rule that where a portion of the testimony of a witness is unobjectionable the party moving to strike out must designate with precision the particular portion challenged, has no application where the whole answer is subject to the objection made. (*Id.*)
10. **INSTRUCTIONS AS TO NEGLIGENCE—WANT OF CARE IN FAILING TO FURNISH PARTICULAR APPLIANCE.**—In an action by an employee against his employer to recover damages for personal injuries on the ground of the latter's alleged negligence in failing to furnish

NEGLIGENCE (Continued).

suitable appliances with which to work, instructions to the jury are erroneous which make the question of the defendant's negligence to turn on the conclusion of the jury as to whether or not the appliance furnished and used was in fact suitable for the work as it was then being done, without regard to whether or not there had been any want of ordinary care on the part of the defendant or its personal representative, in failing to furnish another kind of appliance. (Id.)

11. NEGLIGENCE CAUSING DEATH—LAW OF FOREIGN STATE—TRANSITORY ACTION.—A cause of action to recover for a death occasioned by negligence, created by the statutes of another state, or of the United States, is transitory in its nature, and may be enforced in this state, but only for the purpose and upon the terms permitted by the *lex loci*. (Ryan v. North Alaska Salmon Company, 438.)
12. ACTION IN THIS STATE—FOREIGN LAW MUST BE PLEADED AND PROVED.—As at common law there was no right of action for an injury causing death, and as the courts of this state do not take judicial notice of the laws of foreign states, it is necessary for the plaintiff, in an action in this state to recover for an injury causing death in a foreign state, to allege and prove the law of such foreign state giving a right of action for the death. (Id.)
13. RIGHT OF PLAINTIFF TO SUE.—In such an action, the law of the foreign state must be pleaded not only to show that in that forum there existed the right of action sued upon, but also to show that the action is brought by the person in whom, under the laws of the foreign jurisdiction, the right of action is vested. (Id.)
14. LAWS OF FOREIGN STATE CONTAINED IN BRIEFS.—The presentation of the laws of the foreign state in the briefs of counsel cannot on appeal be considered the equivalent of a presentation of them in evidence. (Id.)
15. DISMISSAL OF ACTION—REFUSING LEAVE TO AMEND—HARMLESS IRREGULARITY.—The ordering such action dismissed without leave to amend, upon sustaining a demurrer to the complaint for want of sufficient facts to constitute a cause of action, although technically erroneous, will not warrant a reversal on appeal, when it is apparent that the plaintiff, under the law of the foreign state, could not amend so as to state a cause of action. In such case the irregularity is without injury. (Id.)
16. ACTION BY SERVANT FOR NEGLIGENCE OF MASTER—ERROR IN DENYING NONSUIT—ORDER GRANTING NEW TRIAL—REVIEW UPON APPEAL.—In an action by a servant for injuries received through the alleged negligence of his employer in not providing him a safe place for work, in which after verdict for plaintiff, the court granted a new trial on the sole ground that it erred in denying defendant's motion for nonsuit on the plaintiff's evidence, though this court is not limited

NEGLIGENCE (Continued).

in its review of the order to the ground thus assigned, it is sufficient that the order may be sustained on such ground. (*Brett v. S. H. Frank & Company*, 267.)

17. **EMPLOYER NOT REQUIRED TO INSURE AGAINST ACCIDENTS—ASSUMPTION OF RISK BY SERVANT.**—An employer in performing his duty to provide a reasonably safe place in which the servant is to do the work assigned to him, is not required to insure a servant against accidents, or to take extraordinary cautions to prevent it; and the servant assumes the risk of all known dangers in the course of his employment, which he can avoid with ordinary care. (*Id.*)
18. **SHAFT-HOLE IN FLOOR OF TANNERY—KNOWLEDGE OF ADULT SERVANT—FORGETFULNESS OF PERIL—CONTRIBUTORY NEGLIGENCE.**—Where the employer maintained an open shaft-hole in the floor of his tannery, which operated the elevator, the existence of which was fully known to an adult servant whose ordinary duties in wheeling sides of sole leather upon a track to the elevator enabled him to clear the hole, but in temporary forgetfulness of his peril, while plaintiff with an assistant was backing the truck to the elevator, he stepped into the shaft hole, such forgetfulness, being due to his want of ordinary care, did not raise a question of fact for the jury, but was contributory negligence, barring recovery, for which a nonsuit should have been granted. (*Id.*)
19. **FORGETFULNESS OF PERIL—WHEN NOT BARRING RECOVERY—EXCEPTIONAL CASES.**—Preoccupation or forgetfulness of peril on the part of an employee, which does not bar recovery as matter of law, but raises a question for the jury, only applies in exceptional cases, having to do with abnormal risks and with the performance of duties under the high tension of emergency, and where the doing of one necessary thing under the stress of immediate action, does not charge him with contributory negligence because he has omitted or forgotten another. (*Id.*)
20. **GENERAL RULE UNAFFECTED BY EXCEPTIONS.**—Such exceptional cases are in no way subversive of the long-established rule that “the law demands that one who is working in a place where he is exposed to danger shall himself exercise his faculties for his own protection, and does not permit a recovery for damages resulting from a neglect of this rule.” (*Id.*)

See *Mines and Mining*, 3.

NEW TRIAL.

1. **MOTION FOR MUST BE PROSECUTED DILIGENTLY.**—A motion for a new trial is an independent proceeding in an action, in which the burden of acting is at all times upon the moving party, and it devolves upon him to proceed with diligence. (*Dorcy v. Brodis*, 673.)

NEW TRIAL (Continued).

2. **DISMISSAL FOR WANT OF DILIGENCE—DISCRETION.**—A motion for a new trial may be dismissed for lack of due diligence in its prosecution, and the determination of the question as to whether there has been due diligence is one necessarily largely within the discretion of the trial court. (Id.)
3. **DELAY OF FOUR MONTHS IN SETTLING STATEMENT.**—An inexcusable delay for almost four months in having a proposed statement on motion for a new trial heard and settled, is sufficient to warrant the trial court in finding that the moving party had not proceeded with due diligence, and justifies it in dismissing the motion. (Id.)
4. **FIXING DATE FOR SETTLEMENT OF STATEMENT.**—The right of the prevailing party to have a motion for a new trial dismissed on account of the failure of the moving party to prosecute it diligently by having the statement settled could not be affected by the action of the court of its own motion or by the *ex parte* application of the moving party in fixing a day for the settlement. (Id.)
5. **ORDER GRANTING NEW TRIAL—APPEAL—REVIEW NOT LIMITED TO GROUNDS STATED.**—In reviewing an order granting a new trial, the appellate court is not limited to the grounds expressly stated in the order, but may consider and determine any ground specified in the notice of intention, except that the ground for insufficiency of evidence cannot be reviewed, when the evidence is substantially conflicting. (*Wendling Lumber Company v. Glenwood Lumber Company*, 411.)
6. **ORDER GRANTED FOR INSUFFICIENCY OF EVIDENCE—SUPPORT OF VERDICT FOR MOVING PARTY—CHANGE OF JUDGE IMMATERIAL.**—Where the order was granted for insufficiency of the evidence; and sufficient evidence appears to support a verdict for the moving party, notwithstanding conflicting evidence to the contrary, this court cannot interfere with the order; and the fact that the order was made by a judge other than the one who tried the case, is immaterial, and cannot extend the power of this court to interfere therewith. (Id.)
7. **MOTION FOR NEW TRIAL—SETTLEMENT OF BILL OF EXCEPTIONS—FAILURE TO PRESENT IN TIME—WAIVER OF OBJECTION.**—Where, after notice of the settlement of a bill of exceptions on motion for new trial before the judge the opposing counsel appeared, and the counsel for the moving party, through inadvertence failed to be present at the time appointed, and was informed that the judge had suggested that the parties endeavor to settle the bill between themselves, to which the opposing counsel made no objection, and agreed for a meeting for settlement, at which he first objected that the bill was not presented in time, and urged such objection at the hearing, his subsequent objection came too late, and was waived. (*Bollinger v. Bollinger*, 190.)

NEW TRIAL (Continued).

8. **MOTION TO DISMISS—ACTION OF COURT IN DENYING MOTION FOR NEW TRIAL—EXCULPATION FROM NEGLIGENCE.**—Where, at the hearing of the motion for a new trial, the opposing counsel moved to dismiss the motion for failure to present the bill of exceptions in time, and the order of the court at the hearing, merely denied the motion for a new trial, its order in effect exculpated the counsel for the moving party from the charge of negligence. (Id.)
9. **APPEAL FROM ORDER DENYING MOTION—PRELIMINARY OBJECTION TO HEARING.**—A preliminary objection to the hearing of the appeal, from the order denying the new trial, that the bill of exceptions was not presented in time, is without merit. (Id.)
10. **ORDER DENYING NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE PROOF.**—Where a new trial for newly discovered evidence is denied the order will be sustained, independently of the question of laches, where the affidavits are of little importance or are merely cumulative. (Estate of Doolittle, 29.)
11. **NEWLY DISCOVERED EVIDENCE—INSUFFICIENT AFFIDAVITS.**—Motions for a new trial on the ground of newly discovered evidence are always subject to careful scrutiny by the court, and the decision rests on its sound discretion. It is held that, not only was there no abuse of discretion in denying the motion, in this case, but also, that there is nothing contained in the affidavits which would have justified the court in granting a new trial on the ground of newly discovered evidence. (Estate of Dolbeer, 652.)
12. **EXCESSIVE JUDGMENT—WAIVER OF EXCESS—DENIAL OF MOTION.**—Where pending a defendant's motion for a new trial the plaintiff files a written waiver of an excessive amount included in the judgment in his favor, the court may, by an order unconditional in form, recite such waiver and deny the motion at once. (Bentley v. Hurlburt, 796.)
13. **AFFIDAVITS USED ON MOTION—BILL OF EXCEPTIONS.**—Affidavits included in the transcript, purporting to show newly discovered evidence and to have been used on a motion for a new trial, cannot be considered on an appeal from an order denying the motion unless authenticated by being embodied in a bill of exceptions or otherwise as required by rule XXIX of the supreme court. (Id.)

See Appeal, 3, 7-16; Negligence, 16.

NOVATION. See Specific Performance, 15-17.

OFFICE AND OFFICERS.

1. **PUBLIC OFFICER—REFUSAL TO PERFORM OFFICIAL DUTY—LIABILITY FOR SPECIAL INJURY—MANDAMUS.**—A public officer is liable to respond in damages to one specially injured by his neglect or re-

OFFICE AND OFFICERS (Continued).

fusal to perform an official ministerial duty to the extent of such special injury, and under the statutes of this state (Pol. Code, sec. 4332; County Government Act, sec. 222) for every failure or refusal to perform official duty where the fees are tendered, the officer is liable on his official bond. This remedy to the injured party necessarily exists independently of the right of a party beneficially interested in the performance of an official duty to compel the performance of the same by the proceeding of *mandamus*. (Payne v. Baehr, 441.)

2. **GARNISHMENT OF MONEYS OWING BY MUNICIPALITY—DUTY OF AUDITOR TO JUDGMENT CREDITOR.**—Under section 710 of the Code of Civil Procedure, enacted March 20, 1903, it is the official duty of the auditor of the city and county of San Francisco to draw his warrant, upon compliance with the conditions specified in such section, for the benefit of a judgment creditor of a person to whom the city and county owes money, and for the failure to perform such duty the auditor is liable in damages to such judgment creditor properly demanding the performance of such duty. (Id.)
3. **SALARY OF POLICE COURT STENOGRAPHER—PLEADING—PRESENTATION OF DEMAND.**—In an action against such auditor to recover damages for his failure to draw a warrant against the amount due for salary to an official stenographer of the police court of said city and county, for the benefit of a judgment creditor of that official, a complaint which alleges that the stenographer had performed all conditions on his part to be performed "to entitle him to have his demand against the treasury audited by said auditor," sufficiently avers, as against a general demurrer, the presentation of a demand in proper form to be audited by the auditor. (Id.)
4. **FILING OF AUTHENTICATED TRANSCRIPT OF JUDGMENT—DAMAGES—EXEMPTION OF SALARY FROM EXECUTION.**—In such an action, it is not necessary to allege in the complaint that the authenticated transcript of the judgment, required to be filed with the auditor under section 710 of the Code of Civil Procedure, was filed subsequent to the auditing by him of the stenographer's demand for salary; nor in order to show damage to the plaintiff, was it necessary that the complaint should allege that the money owing to the stenographer from the city and county were in whole or in part not exempt from execution. Such exemption, if it existed, was a matter for the defendant to show on the issue of damages. (Id.)
5. **MONEY OWING BY MUNICIPALITY—ACCRUAL OF CLAIM.**—Under that section, the judgment creditor can obtain only such money as "is owing to the judgment debtor" at the time of the filing of the authenticated transcript of judgment and affidavit, but money may be so "owing" although the demand therefor has not been audited. It is sufficient that the claim of the judgment debtor against the

OFFICE AND OFFICERS (Continued).

city and county has fully accrued at the time of the filing of the transcript, and when finally the demand is audited and ready for payment, the transcript of judgment previously filed is sufficient to cover the audited claim to the extent that it had accrued at the time of such filing. (Id.)

6. **APPROVAL OF JUDGMENT CREDITOR'S DEMAND—DEMAND ON AUDITOR FOR DAMAGES.**—In such an action, it was not necessary for the demand of the judgment creditor of the stenographer to be approved by the police judges, nor was it essential to his cause of action against the auditor for damages that he should have made any demand on the auditor, other than the demand embraced in the filing of the authenticated transcript of judgment and affidavit provided for by section 710 of the Code of Civil Procedure. (Id.)

See Libel, 1-3; Place of Trial; Police Courts.

OIL LANDS. See Mines and Mining, 1, 2.

ORDERS. See Estates of Deceased Persons, 22-24.

PARKS. See Municipal Corporations, 5.

PARTIES. See Corporations, 7-9; Insurance, 2; Mortgage, 8, 9.

PARTITION.

1. **INTERLOCUTORY DECREE—APPEAL FROM ORDER CONFIRMING SALE—TENANT IN POSSESSION MAY APPEAL.**—Where the interlocutory decree in an action of partition directed a sale of the common property, one who was adjudged to be a tenant in common, and who was in possession, had the right to oppose the confirmation of the sale, and to have it vacated if not made in conformity with law, or for an adequate price, and the corresponding right to review, on appeal, an order confirming such sale. (Gordan v. Graham, 297.)
2. **INTERLOCUTORY DECREE IS FINAL JUDGMENT.**—The interlocutory decree directing the sale is to be regarded as a final judgment with respect to subsequent orders in aid of its execution. (Id.)
3. **ORDER FOR WRIT OF ASSISTANCE IS APPEALABLE.**—An order for a writ of assistance, directing the sheriff to put the purchaser at the partition sale in possession, must also be considered, for the purposes of an appeal, as an order made after final judgment. (Id.)
4. **EX PARTE ORDER—APPEAL FROM ORDER REFUSING VACATION OF WRIT.**—Where the order for the writ of assistance was made *ex parte*, without notice to the tenant in possession, the latter had the right, in order to secure an available record on appeal, to move for

PARTITION (Continued).

a vacation of the order and writ, and, if the motion were denied, to appeal from the order of denial, instead of appealing directly from the *ex parte* order. (Id.)

5. **UNDERTAKING TO STAY PROCEEDINGS—DUTY OF JUDGE TO FIX AMOUNT—MANDAMUS.**—An appeal by the tenant in possession from an order refusing to vacate the order for the writ of assistance, is in substance an appeal from an order for the delivery of possession of real estate, and under section 945 of the Code of Civil Procedure it was the duty of the trial judge, upon a proper application in that behalf, to fix the amount of the undertaking to be given to stay proceedings on the writ, pending the appeal, and *mandamus* lies to compel performance of the duty. (Id.)

See Dedication, 1; Water and Water-Rights, 1, 2.

PARTNERSHIP.

1. **PURCHASE BY PARTNERSHIP AND INDIVIDUAL MEMBER.**—A member of a partnership as an individual may unite with the partnership in the purchase of property for the joint benefit of the partnership and himself personally. (Bedwood City Salt Company v. Whitney, 421.)
2. **ACTION AGAINST PARTNERSHIP AND INDIVIDUAL MEMBER—PLEADING.**—An action to recover the purchase price of goods sold to a partnership and one of its members individually, is properly brought against all the members of the firm as partners, and such member individually; and a complaint therein which properly alleges such a sale, is not uncertain, ambiguous, or unintelligible, and does not misjoin causes of action or parties. (Id.)
3. **FORM OF JUDGMENT—EVIDENCE SHOWING MERE SALE TO PARTNERSHIP.**—In such an action, where the evidence shows merely a purchase by and delivery to the partnership, there is no liability on the part of the defendant sued individually except such as the law imposed upon him as a member of the partnership for a partnership debt, and judgment should not be entered against him for an individual as distinguished from a partnership debt. (Id.)
4. **MODIFICATION OF JUDGMENT ON APPEAL.**—Where, in such an action, judgment is entered against the partnership and also against the member individually sued, and the evidence shows merely a sale to the partnership, the court has power, on appeal, under section 578 of the Code of Civil Procedure, without directing an entire reversal of the judgment, to order its modification so that it shall be merely a judgment against the members of the partnership on their partnership liability. (Id.)
5. **EVIDENCE—REASONABLE VALUE.**—The evidence reviewed and held to show that the amount for which judgment was rendered was the reasonable value of the goods sold. (Id.)

PENALTY. See Statutes.

PHYSICIAN AND SURGEON.

1. **PHYSICIANS—PRACTICE WITHOUT CERTIFICATE—CONSTRUCTION OF PENAL STATUTE.**—In order to bring any person within the penal provisions of the act of March 14, 1907, making it a misdemeanor for any person to practice or attempt to practice, or advertise or hold himself out as practicing medicine or surgery or osteopathy, or any other system or mode of treating the sick or afflicted in this state, without having at the time of so doing a valid unrevoked certificate as provided in the act, it must appear that he is engaged in the line of work specified as a business, or holding himself out as being so engaged. (*Ex parte Greenall*, 767.)
2. **INSUFFICIENT COMPLAINT IN JUSTICE'S COURT—HABEAS CORPUS.**—A complaint in a justice's court charging a misdemeanor, under said act, which does not show the facts required to constitute a medical practice thereunder, but the allegations of which are entirely consistent with the innocence of the defendant, cannot support a conviction, and the defendant will be discharged upon *habeas corpus*. (*Id.*)

PLACE OF TRIAL.

1. **ACTION AGAINST PUBLIC OFFICERS—ACT DONE BY VIRTUE OF OFFICE.**—Section 393 of the Code of Civil Procedure, providing that actions against a public officer for an act done by him in virtue of his office, must be tried in the county where the cause, or some part thereof, arose, applies only to affirmative acts of the officer which directly interfere with the personal rights or property of the person complaining, such as wrongful arrest, trespass, conversion, etc., and does not apply to mere omissions or neglect of official duty. (*Bonestell, Richardson & Co. v. Curry*, 418.)
2. **ENJOINING PERFORMANCE OF ILLEGAL CONTRACT—COUNTY OF RESIDENCE OF DEFENDANTS.**—An action by a taxpayer against the secretary of state, the assistant attorney-general and the state printer, and the members of a firm to which a contract for the furnishing of paper for use in the state printer's office had been awarded by such state officials, to enjoin further action in regard to or under said contract, upon the ground that the same was illegal and void, is not an action against public officers for an act done by them, but is an action against them and the other persons to prevent the doing of certain acts in the future. The proper county for the trial of such action, subject to the power of the court to change the place of trial on statutory grounds, is the county in which the defendants, or some of them, reside at the commencement of the action. (*Id.*)

See *Wills*, 16.

PLEADING.

1. **ACCORD AND SATISFACTION—RELEASE.**—The defenses of accord and satisfaction and of release are affirmative defenses and must be pleaded by the defendant. (*Great Western Gold Co. v. Chambers*, 307.)
2. **AMENDMENT OF COMPLAINT.**—Unless it be clear to a trial court that a defective complaint cannot be amended so as to obviate the objections made thereto, a plaintiff desiring it should be allowed reasonable opportunity to so amend. (*Payne v. Baehr*, 441.)
3. **DEMURRER—UNCERTAINTY IN COMPLAINT.**—The overruling of a demurrer to a complaint on the ground of uncertainty affords no ground for a reversal when it is apparent from the record that the defendants were not thereby misled or embarrassed in making their defense. (*Huffner v. Sawday*, 86.)

See Husband and Wife, 8-11; Negligence, 6, 12; Office and Officers, 3, 4; Partnership, 2; Pledge, 1-5; Sale, 2, 3; Specific Performance, 1, 13, 14, 26, 28, 29; Statute of Limitations, 1, 2; Way, 4; Wills, 6-9.

PLEDGE.

1. **INSUFFICIENT COMPLAINT FOR REDEMPTION.**—A complaint for redemption of property pledged which shows on its face that the property has passed out of the possession and control of the pledgor, and that it has not the ability to perform the contract of pledge or to comply with a decree for specific performance thereof, and which does not allege that defendant has other sufficient shares of pledged stock in its possession out of which performance might be adjudged, and does not allege a tender of the amount secured by the pledge, or any offer to perform the contract on plaintiff's part, the precise amount of which is shown in the complaint, fails to state a cause of action for redemption. (*Bell v. Bank of California*, 234.)
2. **CAUSE OF ACTION FOR CLAIM AND DELIVERY NOT STATED.**—The complaint is insufficient to state a cause of action in claim and delivery where it does not seek the recovery of specific certificates of stock; nor will claim and delivery lie for shares of stock merely as intangible property. (*Id.*)
3. **CAUSE OF ACTION FOR DAMAGES FOR CONVERSION—STATUTE OF LIMITATIONS.**—If the complaint be regarded as setting forth a cause of action for damages for the conversion of pledged property, or for an excess in value of the pledged property over the amount of the debt, either of such causes of action arose upon the transfer of the securities by the defendant, and when the complaint was filed, more than three years after such transfer, either of such causes of action is barred by subdivision 3 of section 338 of the Civil Code. (*Id.*)

PLEDGE (Continued).

4. **PRAYER FOR ACCOUNTING OF VALUE OF PLEDGED PROPERTY IMMATERIAL.**—The prayer for an accounting of the value of the pledged property is immaterial to either cause alleged. The cause of action, whether legal or equitable, is determined by the sufficiency of the allegations of the complaint. Any accounting, if had, would be merely incidental to a main cause of action, if any were stated, and such incidental relief cannot be granted, without reference to any cause of action. (Id.)
5. **DISMISSAL OF ACTION UPON ORDER SUSTAINING DEMURRER.**—Where no leave to amend the insufficient complaint was applied for, it was not error, or an abuse of discretion, to order a dismissal of the action upon the order sustaining a general demurrer to the complaint. (Id.)
6. **ACTION FOR CONVERSION OF BRICKS—ATTACHMENT—DEMAND UPON SHERIFF—WANT OF OWNERSHIP—TRANSFER AS SECURITY—CONTRACT FOR PLEDGE—POSSESSION.**—An action for the conversion of bricks attached by the sheriff at suit of a former owner of the property on which the bricks were burned, for unpaid purchase money, cannot be maintained, where plaintiff was not the owner of the bricks attached, and did not have possession thereof when demand was made upon the sheriff for return thereof, but merely held a transfer of the owner's interest, and of bricks made and to be made, as security for advances, and for an interest in the bricks when sold, which was in effect a contract for a pledge not consummated by delivery and actual change of possession of the bricks made, as required by section 3440 of the Civil Code. (*Sequeira v. Collins*, 426.)
7. **CONSTRUCTION OF CODE—TRANSFER OF PROPERTY NOT IN EXISTENCE—PLEDGE OF EXISTING PROPERTY.**—Section 3440 of the Civil Code does not apply to a transfer of property not in existence as security; but when the property comes into existence, under a contract for a pledge thereof, that section applies and the delivery and actual and continued and open change of possession of the pledged property, must be the same as is required in case of sales thereof. (Id.)
8. **RETENTION OF POSSESSION AND CONTROL BY TRANSFERREE OR PLEDGEE.**—The retention of the possession and control by the transferee or pledgor of personal property, after the transfer and pledge, without doing anything to indicate an intention to pass that control and dominion to the transferee or pledgee, is inconsistent with an actual possession in the transferee or pledgee, and cannot justify a finding thereof, as against an attaching creditor. (Id.)
9. **FINDING UNSUPPORTED BY CONCLUSIONS OF PLEDGEE.**—The testimony of the pledgee to general statements that he had possession

PLEDGE (Continued).

of the bricks and visited the premises, and gave directions to the men engaged in burning the same, is insufficient to show a change of possession, his general statement being his mere conclusions as to possession and it appearing that the pledgor maintained the control and dominion over the bricks without words indicating an intention to change it. (Id.)

10. **CHANGE OF POSSESSION OF BULKY PROPERTY.**—Though it is not essential that bulky property should be removed from the premises in order to make a change of possession, yet it is essential that there shall be an expression of the intention of the transferrer to pass the possession and dominion thereof to the transferee. (Id.)

See Mortgage, 8, 9.

POLICE COURT.

1. **CHARTER OF LOS ANGELES—VOID PROVISION NOT VALIDATED BY AMENDMENT TO CONSTITUTION.**—Under the freeholders' charter of the city of Los Angeles, ratified by the legislature in January, 1889, there being no provision of the constitution then providing for a police court thereunder, the provision therein for a police court was void, *ab initio*, and was not revived or validated by the mere subsequent passage of the amendment to the constitution adding section 8½ of article XI, authorizing the creation of police courts by freeholders' charters. (Fleming v. Hance, 162.)
2. **PERMISSIVE AMENDMENT—POWER OF LEGISLATURE—EXPENSES OF JUDGES—CHARGE UPON CITY TREASURY.**—The grant made in section 8½ of the constitution is merely permissive. If a freeholders' charter has, pursuant thereto, created a police court, the legislature cannot create within the city another police court maintainable at the city's expense. But where the city has not used such permission the legislature has power, under section 1 of article VI, to establish police or other "inferior courts" in any incorporated city or town, and to make the salaries and office expenses of the judges or justices thereof a charge upon the city treasury. (Id.)
3. **SALARY OF PROSECUTING ATTORNEY IN POLICE COURT—MUNICIPAL CHARGE—INVALID STATUTE.**—The statute creating a police court in the city of Los Angeles, in so far as it provides that the salary of the prosecuting attorney required to attend thereupon and conduct all criminal cases therein, shall be a charge upon the city treasury, is invalid. The prosecuting attorney is no part of the court for that purpose; and in prosecuting public offenses of which it has jurisdiction, he acts as attorney for the state, and his duties are not municipal in their nature because exercised within the city. The burden for such prosecutions is to be borne by state or county under the general law provided for in section 5 of article XI of the constitution, and cannot be made a charge upon the city. (Id.)

POLICE COURT (Continued).

4. **VIOLATIONS OF CHARTER AND ORDINANCES—FUNCTION OF CITY ATTORNEY—"MUNICIPAL AFFAIRS"—CONTROL OF STATUTE.**—As respects prosecutions for violations of the city charter and city ordinances, the regulation thereof by the city is a "municipal affair," within section 6 of article XI of the constitution; and where the city charter regulates that matter, and imposes the duty upon the city attorney to prosecute all such violations, the charter must control a general statute imposing such duties upon the district attorney, and such statute is ineffective. (Id.)
5. **PROSECUTORS AS DEPUTIES OF CITY ATTORNEY—SALARIES NOT A CITY CHARGE.**—If the prosecuting attorney and his assistants, when acting at request of the city attorney, act as his deputies, that does not authorize them to enforce a claim against the city, where there is nothing in the charter or in any city ordinance allowing such deputies to receive salaries payable out of the city treasury. (Id.)

PRACTICE.

1. **WATER-RIGHTS—JUDGMENT ORDERED FOR PLAINTIFF—FINDINGS—EXCUSABLE NEGLECT TO PROCURE AND ENTER JUDGMENT—DISMISSAL—ABUSE OF DISCRETION.**—Where the court after trial of an action by a riparian owner to enjoin a diversion of the stream, ordered judgment for plaintiff, and detailed findings were prepared by a non-resident attorney, and sent to associate counsel for signature and judgment, and in the absence of such counsel, an inexperienced attorney in his office secured the signed filing of the findings, but by excusable neglect failed to obtain and enter judgment for more than six months, it was an abuse of discretion for the court, on motion of defendant, who, as a continuing trespasser, was not injured, but benefited by the delay, in entering judgment enjoining the trespass, to dismiss the action for such neglect, and thereby deprive the plaintiff of the just fruits of a judgment to which he was entitled. (Rickey Land and Cattle Company v. Glader, 179.)
2. **APPEAL FROM DISMISSAL AFTER SIXTY DAYS—REVIEW OF EVIDENCE BEFORE TRIAL COURT—CONSTRUCTION OF CODE.**—Though the appeal from the judgment of dismissal was taken after the lapse of sixty days, the court may review the evidence which was before the trial court when the dismissal was ordered. Such judgment, being without findings, and without an opportunity to the appellant to prepare a record, under sections 648 and 649 of the Code of Civil Procedure, is not an "exception to the decision or verdict" within the meaning of section 939 of the Code of Civil Procedure. (Id.)
3. **ACTION TO FORECLOSE MORTGAGE—NOTICE OF APPEARANCE COMPLETE WITHOUT FILING—CONSENT TO JUDGMENT—FILING REQUIRED ONLY FOR JURISDICTION.**—Where defendants in an action to foreclose a

PRACTICE (Continued).

mortgage by deed were served with summons, and gave notice to the plaintiff of their appearance and consent to judgment, the appearance was complete when the notice thereof was served; and no particular time was required within which to file the same, the only object of filing the notice and consent being to give the court jurisdiction to render judgment against the defendants. (*Anglo-Californian Bank v. Griswold*, 692.)

4. **EXCUSABLE DELAY IN FILING NOTICE AND CONSENT—REQUEST FOR DELAY BY DEFENDANTS.**—Where the plaintiff delayed filing the notice of appearance and consent to judgment at defendants' request, they hoping that the property would increase in value, and sanctioning sales by plaintiff at any time, the delay in filing the same until after three years was excusable. (*Id.*)
5. **DEATH OF ONE DEFENDANT—APPEARANCE OF CO-DEFENDANT, AND AS EXECUTRIX BY ATTORNEY—CONSENT TO JUDGMENT—TRIAL—SUBMISSION—ERROR IN DISMISSAL.**—Where one defendant died before the stipulation was filed, and the co-defendant appeared by attorney for herself and as executrix of her deceased husband, and consented to foreclosure under stipulation against the docketing of any deficiency judgment, and the case was tried accordingly and submitted for decision, before a motion for dismissal was made, it was error for the court thereafter to dismiss the action under subdivision 7 of section 581 of the Code of Civil Procedure, for want of prosecution, on motion of a second mortgagee claiming under the defendants, and of a creditor of the estate of the deceased defendant, the defendants themselves being the only parties to the action. (*Id.*)

See Appeal; Bill of Exceptions; Certiorari; Costs; Execution; Findings; Instructions; Judgment; New Trial; Partition; Place of Trial; Pleading; Prohibition.

PROBATE LAW. See Estates of Deceased Persons; Wills.

PROHIBITION.

ACTION TO PREVENT ISSUANCE OF CERTIFICATE OF PURCHASE OF STATE LAND—JURISDICTION.—The state may, under certain circumstances, maintain an action to prevent the issuance of a certificate of purchase of state lands, of which the superior court would have jurisdiction. Consequently, prohibition will not lie to prevent the prosecution of such an action, notwithstanding the complaint therein may be defective for failure to state a cause of action. (*Woodworth v. Superior Court of the County of Marin*, 38.)

PUBLIC OFFICERS. See Office and Officers.

PUBLIC POLICY. See Contracts, 1-4; Wills, 6-14.

QUIETING TITLE.

1. **ACTION TO QUIET TITLE—RIGHT OF POSSESSION UNDER CONTRACT—UNSUPPORTED FINDINGS.**—In an action to quiet title to twenty-five acres of land, where defendant pleaded a right of possession of the whole thereof under a contract, and proved only a right of possession of 13.08 acres, a finding that he was entitled to the possession of the residue, is without support; and a new trial must be ordered. (*Kaiser v. Barron*. 474.)
2. **ACTION TO QUIET TITLE—MEXICAN GRANT—CONVEYANCE BY PLAINTIFF—MORTGAGE BACK—INSUFFICIENT POSSESSION—NONSUIT.**—In an action to quiet title under a Mexican grant, where it appears that the only title the plaintiff had thereunder, he had conveyed to third parties, who had executed a mortgage back to plaintiff, such mortgage passed no title; and where the plaintiff shows no other title or possession, except that of an adobe house, not shown to be situated on the Mexican grant, and no patent appears to have issued for such grant, the plaintiff was properly nonsuited. (*Castro v. Adams*, 382.)
3. **CROSS-COMPLAINT BY ASSIGNEE OF MORTGAGE—PAYMENT OUT OF SALES—CONSTRUCTIVE TRUST—LIMITATIONS—STALE DEMAND—NONSUIT.**—Where the cross-complainant claimed as assignee of the mortgage, which by its terms was payable out of sales, alleging that numerous conveyances were made, but not showing when they were made, or what prices were realized, it must be presumed that all conveyances were made within a reasonable time, and when there was a delay of over thirty-five years to demand an accounting, even though a constructive trust was relied upon, growing out of a breach of a parol interest by parties in confidential relation, the statute would begin to run against such trust, from the time of such breach, and the cause of action being barred by the statute of limitations, and the suit being upon a stale demand in equity, a nonsuit of the cross-complainant was properly granted. (*Id.*)

See Title to Land; Vendor and Vendee, 3.

RAILROADS. See Contracts, 1-4; Franchise; Mandamus, 1; Specific Performance, 10-14, 32, 33; Taxation, 1.

RECEIVER. See Certiorari, 1; Insurance, 3, 4.

RECORDING.

1. **RECORDING OF MAPS OF SUBDIVISION OF LAND—ACT OF MARCH 9, 1893—SALE OF LOTS BEFORE RECORDING AND AFTER FILING.**—Sections 3 and 4 of the act of March 9, 1893, as amended in 1901

RECORDING (Continued).

(Stats. 1893, p. 96; 1901, p. 288), requiring the recording of maps of subdivisions of lands into small lots for purposes of sale, and providing a penalty for selling or offering for sale such lots before such maps are filed and recorded, when properly construed only prohibits the sale or offering for sale of the certain classes of lots specified therein before a map made, acknowledged, certified, and indorsed as specified in the act shall have been presented to the recorder to be recorded. The proprietor of the land has then done all that the law imposes upon him, and a delay of the recorder in performing the ministerial duty of posting the map in the book of maps will not affect the right of the owner to make a sale, or render a sale criminal, which was made after the map was presented to the recorder and before it was pasted in the book of maps. (*Bentley v. Hurlburt*, 796.)

2. APPROVAL BY COUNTY SURVEYOR NOT REQUIRED—DUTY OF RECORDER.

—The act does not authorize the recorder to make an approval by the county surveyor a condition precedent to the receiving of the map; and where the map is in the form required by the act it is the recorder's duty to receive and record it. (*Id.*)

3. SUBMISSION OF MAP TO SURVEYOR NOT A WITHDRAWAL FROM RECORD.

—Where a map, sufficient in form, is presented by the owner to the recorder for record, the fact that the owner subsequently, at the request of the recorder, took the map to the county surveyor did not constitute a withdrawal by him of the map; and its subsequent recording after its return by the surveyor must be regarded as having been made pursuant to its original presentation for record. (*Id.*)

See Insurance, 5-7.

REFORMATION. See Mistake.

RELEASE. See Pleading, 1.

RESIDENCE. See Guardian and Ward, 2.

ROADS AND HIGHWAYS. See Streets, Roads, and Highways.

SALE.

1. SALE OF DRIED FRUIT BY SAMPLE—SHIPMENT OF QUANTITY EAST—

BREACH OF WARRANTY—TIME OF DISCOVERY—MEASURE OF DAMAGES.—The measure of damages for a breach of warranty upon a sale of dried fruit by sample, upon shipment to an eastern market, is deemed to be the excess, if any, of the value which the property would have had, at the time to which the warranty referred, if it had been complied with, over its actual value at the

SALE (Continued).

time when the breach was discovered, or should reasonably have been discovered, which could not have been expected to occur until the boxes of fruit reached the place to which they were shipped. (*Germain Fruit Company v. J. K. Armsby Company*, 585.)

2. **APPEAL FROM JUDGMENT BY PLAINTIFF—PLEADING AND FINDINGS—UNNECESSARY DIVISION OF DAMAGES—ACTUAL LOSS—LOSS OF PROFITS.**—Upon appeal from the judgment by the plaintiff, where the difference in value appears from the complaint and findings, the segregation of that difference therein into "actual loss," and "loss of profits on resale," was unnecessary under the statute, and when so segregated, it was error for the court to allow only the "actual loss," and to disallow the "loss of profits on resale" as part of the general damages. (*Id.*)
3. **PLEADINGS—GENERAL DAMAGES—SPECIAL PLEADINGS OF LOSS OF PROFITS UNNECESSARY.**—The damages sued for may all be recovered as general damages; and it was not necessary for plaintiff to plead specially how the loss of profits on resale arose. (*Id.*)
4. **DEFENDANT'S APPEAL—FINDING OF WARRANTY AGAINST EVIDENCE—WRITTEN CONTRACT—PAROL EVIDENCE—NEW TERM OF CONTRACT.**—*Held*, on appeal by defendant, that the finding that there was a warranty of quality upon sale by sample is against the evidence, showing that the contract of sale was in writing and is silent on that subject. Parol evidence, though admissible to explain an ambiguity in description of the property sold and to identify the same, is not admissible to introduce any new term into the contract, importing quality or warranty, not included in the meaning of any term used therein. (*Id.*)
5. **IMPORT OF WORD "LOT"—DESCRIPTION.**—The use of the word "lot" in the contract, to indicate "lot A," "lot K," "lot C," and "lot E," each containing a different number of boxes of apricots, is expression of description, and not of quality or warranty. (*Id.*)

See *Contracts*, 1-9; *Fraud*, 4, 5; *Vendor and Vendee*.

SCHOOLS.

1. **PUBLIC SCHOOLS—TEACHER HOLDING CITY CERTIFICATE—REMOVAL.**—Under section 1793 of the Political Code, one holding a city certificate who is elected as a teacher in the public schools of the city for an indefinite term cannot be removed except for causes mentioned in that section and in section 1791 of that code. (*Barthel v. Board of Education of the City of San Jose*, 376.)
2. **TEACHER NOT HOLDING CITY CERTIFICATE.**—Neither section 1793 of the Political Code, nor any other provision of the general state law precludes a city board of education from removing at pleasure a teacher who does not hold a city certificate. (*Id.*)

SCHOOLS (Continued).

3. **ELECTION AND DISMISSAL OF TEACHERS—MUNICIPAL AFFAIRS.**—The election and dismissal of teachers in the public schools are not "municipal affairs," which may, by a freeholders' charter, be regulated in a manner in conflict with that provided by the general law. (Id.)
4. **CHARTER OF SAN JOSE—PROBATIONARY TEACHER—POWER OF BOARD OF EDUCATION TO DROP.**—Under section 13 of article IX of the charter of the city of San Jose, as amended in 1901, a probationary teacher, that is one in his first or second year of service in the school department, who was appointed without holding a city certificate, can be dropped from the department by the board of education only on the adverse report of the classification committee. (Id.)
5. **SCHOOL DISTRICT—LAND OUTSIDE OF CITY LIMITS—TAXATION—LEVY OF TAXES BY TRUSTEES OF CITY.**—Under the Municipal Corporation Act (Stats. 1883, p. 24), and its amendments of 1891 and 1901, and sections 1576 and 1670 of the Political Code, the board of trustees of a city of the fifth class, the territory of which together with adjoining territory outside of its limits constitutes a school district, has power to levy a school tax upon the lands of the school district lying outside of the city. The exercise of such power by the board of trustees is not violative of any inhibition of the constitution. (*Visalia Savings Bank v. City of Visalia*, 206.)
6. **SCHOOL BONDS—INJUNCTION BY TAXPAYER—PLEADING—LEGAL CONCLUSION.**—In an action by a taxpayer to enjoin the issuance of bonds of a school district, an allegation in the complaint that the plaintiff "has no speedy or adequate remedy at law" is a mere conclusion of law, and valueless in the absence of averment of facts supporting it. (*Streator v. Linscott*, 285.)
7. **BONDS INVALID ON THEIR FACE.**—A taxpayer cannot maintain an action to enjoin the issuance of such bonds on the ground of their illegality, where the bonds, if issued, would show their illegality on their face. In such case, the bonds would be void even in the hands of *bona fide* holders for value, and the taxpayer would not be injured. (Id.)
8. **APPEAL—QUESTIONS OF LAW NOT INVOLVED.**—The supreme court on an appeal from a judgment which was rightly made by the trial court, in an action involving an issue of municipal bonds, will not pass upon mere abstract questions of law, not involved in the determination of the appeal, at the request of a party who shows no substantial right that can be affected by a decision either way. (Id.)

SLANDER.

1. **FILING UNDERTAKING—JURISDICTION—FILING UNDERTAKING AFTER COMMENCEMENT OF ACTION.**—The jurisdiction of the court in an

SLANDER (Continued).

action for slander does not depend upon whether a sufficient undertaking is or is not filed at the time the action is commenced. It has such jurisdiction even when no undertaking at all is filed, and may permit one to be filed subsequent to the commencement of the action, and may permit a new undertaking to be filed in lieu of a defective one. (*Becker v. Schmidlin*, 669.)

2. **UNDERTAKING FOR SOLE BENEFIT OF DEFENDANT—DISCRETION IN PERMITTING FILING OF NEW UNDERTAKING.**—The undertaking provided by the statute to be given at the time an action for slander is commenced runs in terms in favor of the defendant, and is intended to secure him in the costs and charges of the action which may ultimately be awarded him. The provision being for his sole benefit, the discretion vested in the court of permitting the plaintiff to file a new undertaking which will afford the defendant all the protection the law intends, should be exercised to effect that end. Especially should this permission be granted, when the plaintiff in good faith has originally endeavored to comply with the statute by filing an undertaking when the suit was commenced, and when a motion to dismiss was made for insufficiency of the undertaking filed, then offered, and was ready and able to file a new and sufficient undertaking. The fact that no new bond was then actually presented to the court is immaterial. (*Id.*)

See Libel.

SPECIFIC PERFORMANCE.

1. **ADEQUACY OF CONSIDERATION—FAIRNESS OF CONTRACT—PLEADING—FINDING.**—Specific performance of a contract for the conveyance of land cannot be had by a vendee where it is neither alleged nor proved that the vendor had received an adequate consideration for the contract, and that as to him it was just and reasonable, nor that facts exist which would justify the inference that such conditions existed. In the absence of such allegation and proof, a finding that the contract was fair and reasonable will not sustain a judgment decreeing specific performance. (*Kaiser v. Barron*, 788.)
2. **ACTION BY EXECUTRIX TO QUIET TITLE TO PUBLIC STREET—CROSS-COMPLAINT BY TOWN—TITLE HELD IN TRUST—PRESENTATION OF CLAIM NOT REQUIRED.**—In an action by an executrix to quiet title (with other lands) to a tract of land occupied by defendant town as a public street, where the town by cross-complaint sought to enforce specific performance of a contract between the town and the testator to convey such tract of land to the town as a public street, for an adequate consideration in services fully performed by the town, and the further payment of fifty dollars, which was tendered to plaintiff and refused, such cross-complaint seeks to enforce a conveyance of real property held in trust by the testator,

SPECIFIC PERFORMANCE (Continued).

and no presentation of the claim on the part of the town was required to be made to the executrix, in order to maintain the cross-complaint. (*Brown v. Town of Sebastopol*, 704.)

3. **FAIRNESS OF CONTRACT—ADEQUACY OF CONSIDERATION.**—Where the cross-complaint fully shows the fairness of the contract sought to be specifically enforced, and the adequacy of the consideration therefor, it is not demurrable for not alleging facts showing that it was just and reasonable as to the testator. (*Id.*)
4. **MUTUALITY OF REMEDY—AGREEMENT TO PERFORM PERSONAL SERVICES—FULL PERFORMANCE—ENFORCEABLE CONTRACT.**—Where the contract provided that in consideration of the agreement to convey the land for a public street, the opening of which was beneficial to the testator's remaining lots, the town was to remove his buildings therefrom upon other lands belonging to him, and would lay out, open up, grade, and oil the street in front of his lots, besides paying him the sum of fifty dollars, although the contract would not be enforceable for want of mutuality of remedy, while such services remained unperformed, yet where the cross-complaint alleges full performance of such services on the part of the town, it shows a cause of action to enforce the contract *in specie* against the testator's estate. (*Id.*)
5. **PAROL CONTRACT—PART PERFORMANCE—POSSESSION BY TOWN—ACTS OF DISCLAIMER BY TESTATOR—ESTOPPEL.**—The irregularity that the contract rested in parol is obviated, where the contract was partly or fully performed, and the town was let into possession of the land by the testator, and induced to expend money on the faith of the contract, and the testator disclaimed title thereto before the trustees of the town, and was relieved from paying taxes thereon. Under such circumstances, his representatives are estopped from retaining the benefits, while refusing performance on their part. (*Id.*)
6. **PRIVATE CONTRACT OF MUNICIPAL CORPORATION—DOCTRINE OF ESTOPPEL.**—The private contract of a municipal corporation in the acquisition of land by purchase, is construed by the same laws that govern the contracts of private persons, in similar cases, and the municipal corporation in relation to such contract, may invoke the doctrine of estoppel, and may be held subject thereto. (*Id.*)
7. **IRREGULAR JUDGMENT—AMENDMENT PENDING APPEAL—BENEFIT OF APPELLANTS.**—Where the complaint to quiet title included lands not claimed by the town, and the specific performance was enforced as claimed by the cross-complaint, and judgment was inadvertently rendered that the plaintiffs take nothing by their action, an amendment of the judgment made after appeal taken to correct such oversight, and to give the plaintiffs the benefit of the remaining lands claimed by them, was not injurious to them, and they cannot complain thereof. (*Id.*)

SPECIFIC PERFORMANCE (Continued).

8. **SPECIFIC PERFORMANCE BY ASSIGNEE—PERSONAL NOTE OF ASSIGNOR—MORTGAGE SECURITY—SUFFICIENCY OF TENDER.**—Notwithstanding the use of the word "assignee" in a contract for the sale of real estate, if the contract calls for the mere personal note of the assignor, after payment of cash required, a specific performance cannot be enforced by the assignee without the tender of such personal note, unless the assignment has been expressly assented to by the other party to the contract; but where the contract calls for mortgage security, after such cash payment, and such security is the principal thing relied upon, the assignee may tender the cash payment and his own note and mortgage, and enforce specific performance, where the other party merely refused the tender, without specifically objecting that the personal note of the assignor was not also tendered. (*Montgomery v. DePicot*, 509.)
9. **ESTOPPEL TO OBJECT TO TENDER.**—Under section 2076 of the Code of Civil Procedure, the defendants in the action for specific performance were estopped from asserting any objection to the tender of cash and mortgage security, which they did not make and which they could or should have made at the time it was offered, and which might have been obviated, if made; and they are precluded from asserting such objection at the trial, or upon appeal. (*Id.*)
10. **CONTRACT FOR LOCATION OF RAILROAD STATION—WHEN ENFORCEABLE.**—A contract for the location of a railroad station may be enforced specifically, where it is fair and just and leaves the railroad free to serve the public interests by the location of additional stations as they might be needed, without limitation of number or location. (*Herzog v. Atchison, Topeka and Santa Fe Railroad Company*, 496.)
11. **WHEN NOT ENFORCEABLE.**—Specific performance of a contract for such location will not be enforced, to subserve mere private interests, in such manner as to hamper the railroad in the performance of its duties to the public, or if the contract is to establish no other stations within a given distance of the agreed location, or where the enforcement of the contract would impose a great burden on the defendant without corresponding benefit to the plaintiff, or would be detrimental to the interests of the public. (*Id.*)
12. **SHOWING OF FAIRNESS AND JUSTICE REQUIRED—ADEQUACY OF CONSIDERATION.**—A complaint for specific performance of a contract must, in order to be sufficient as against a general demurrer, state facts from which the court may determine that the consideration is adequate, and that the contract is as to the defendant, fair, just, and reasonable, and that it would not be inequitable to enforce it. (*Id.*)

SPECIFIC PERFORMANCE (Continued).

- 13. INSUFFICIENT COMPLAINT TO ENFORCE SPECIFIC PERFORMANCE OF CONTRACT FOR STATION.**—Where the complaint for specific performance of a contract for the location of a railway station lacks the showing of fairness, justice, and reasonableness of the contract, or the adequacy of its consideration, and does not state the value of the right of way conveyed to the company as the consideration for the contract, nor allege the cost to the defendant of compliance with the contract, nor show that plaintiffs are the owners of any land near the proposed station, and fails to show that the recovery of damages for breach of the contract would not be an adequate remedy, it is wholly insufficient, as against a general demurrer. (Id.)
- 14. ALLEGATION OF PAST OWNERSHIP—PRESUMPTION OF CONTINUANCE INAPPLICABLE.**—The allegation in the complaint that plaintiffs owned land adjoining the right of way in 1881, is not an allegation that they owned it at any later date. The presumption of the continuance of facts shown to exist, is merely a rule of evidence and not of pleading, and cannot dispense with the averment of the fact of continued ownership. (Id.)
- 15. CONTRACT FOR SALE AND EXCHANGE OF LANDS—MODIFICATIONS—SUBSTITUTED ORAL AGREEMENT—NOVATION—PART PERFORMANCE.**—In an action for specific performance of a contract for the sale and exchange of lands, though an unexecuted oral modification of the original written contract cannot be enforced; yet, where it appears that the oral agreement was substituted by novation in the place and stead of a canceled written contract, and that it provided different terms, and was fully performed on plaintiff's part, by conveyance of the lands belonging to him, he can enforce the substituted oral agreement according to its terms. (*Pearsall v. Henry*, 314.)
- 16. CONSTRUCTION OF CODE—SUBSTITUTED ORAL AGREEMENT NOT A MODIFICATION.**—An oral agreement substituted by novation for a former written contract, is not an oral modification of the written contract within the meaning of section 1698 of the Civil Code, provided the substituted oral agreement is valid and enforceable. (Id.)
- 17. STATEMENT OF FRAUD—PART PERFORMANCE—ACCEPTANCE OF CONVEYANCES FROM PLAINTIFFS BY DEFENDANTS—ESTOPPEL.**—Where the only question is as to the validity of the substituted oral agreement under the statute of frauds, and it appears that the conveyance made by the plaintiffs to defendants was accepted under the new contract, notwithstanding the fact that it was agreed to be made under the former written contract, the defendants are estopped from claiming that such conveyance was not made in part performance of the terms of the substituted oral contract, and that the new contract was void under the statute of frauds. (Id.)

SPECIFIC PERFORMANCE (Continued).

18. **EQUITABLE BASIS OF PART PERFORMANCE—PRIOR WRITTEN OBLIGATION.**—The rule as to part performance of an oral contract for sale or exchange of lands, is based entirely on equitable considerations; and there is no hard and fast rule under which the existence of a prior written obligation bars all inquiry on the subject. It is sufficient that, under the circumstances of the particular case, the act of part performance is referable to the oral contract. (Id.)
19. **ORAL CONTRACT TO EXCHANGE LANDS—PART PERFORMANCE BY PLAINTIFFS—LEGAL DEFENSE—RULE IN EQUITY.**—Where an oral contract for the exchange of lands has been performed by the plaintiff only, though the defendants would have a legal defense to an action against them on the contract, yet the rule in equity is that where there is an oral agreement by the terms of which each party is to convey lands to the other, a conveyance by one party on the faith of the agreement constitutes such part performance as will for the purpose of an action for specific performance take the whole case out of the operation of the statutes of fraud. (Id.)
20. **CONSIDERATION OF ORAL CONTRACT—SETTLEMENT OF DISPUTES.**—A sufficient consideration for the oral contract appeared from evidence sustaining the finding of the court that it was based upon the existence and settlement of disputes between the parties. (Id.)
21. **EVIDENCE—WANT OF CONSIDERATION FOR WRITTEN CONTRACTS—SUPPORT OF PLEADING.**—Where the defendants in their cross-complaint relied upon the previous written contracts, the plaintiffs in support of their answer to the cross-complaint, were properly allowed to introduce evidence as to a want of consideration therefor. (Id.)
22. **ORAL EVIDENCE TO EXPLAIN AMBIGUITY.**—Oral evidence was admissible to show all the circumstances surrounding the parties at the time of the execution of a written contract, by way of explaining ambiguous clauses therein. (Id.)
23. **EVIDENCE—SUBSTITUTED ORAL AGREEMENT.**—Evidence was admissible to show that the oral agreement relied upon by plaintiffs was substituted for the prior written contract to settle disputes arising thereunder. (Id.)
24. **PART PERFORMANCE A QUESTION OF FACT—PROVINCE OF TRIAL COURT—SUPPORT OF FINDINGS.**—The question whether there has been a part performance of an oral contract on the part of the plaintiff, is one of fact to be determined by the trial court; and the question as to the credibility of witnesses, in case of conflicting evidence, is within the exclusive province of the trial court, and its findings must be deemed in such case supported by the evidence and will not be disturbed upon appeal. (Id.)
25. **FINDING AGAINST EVIDENCE—AMOUNT OF INCIDENTAL EXPENSE—AVOIDANCE OF NEW TRIAL—CONSENT TO MODIFICATION OF JUDGMENT.**—Where it appears that a finding as to the amount of incidental

SPECIFIC PERFORMANCE (Continued).

- expense allowed by the court is not sustained by the evidence, and to avoid a new trial on that particular question, the respondents' offer to remit the whole amount allowed from the judgment, the judgment will be modified in that respect, and the order denying a new trial will be affirmed, and the judgment as modified affirmed, at appellants' costs. (Id.)
26. **LEASE WITH OPTION TO PURCHASE—ELECTION TO PURCHASE—REFORMATION.**—*Held*, that the complaint as amended states a cause of action for the enforcement of an option to purchase contained in a lease which plaintiff had elected to exercise during the term, and to reform the lease for mutual mistake, in regard to the improvements, which removed all uncertainty in relation thereto, though such uncertainty did not make the contract uncertain as an agreement to sell. (*Swanston v. Clark*, 300.)
27. **ADEQUACY OF CONSIDERATION FOR OPTION—TERMS OF RENTAL.**—The payment of increased rent on account of the option, and the payment of rent in advance for one year, was a sufficient consideration for the option. (Id.)
28. **INSUFFICIENT PLEA OF RESCISSION PRIOR TO TENDER—ABSENCE OF OFFER TO COMPENSATE FOR IMPROVEMENTS.**—A plea of rescission of the option to purchase prior to the tender of purchase money by plaintiff, is insufficient, where it admitted the making of valuable improvements by the plaintiff and did not offer to compensate the plaintiff therefor, nor show any right of rescission for one or more of the causes enumerated in section 1689 of the Civil Code, or any rescission by consent. (Id.)
29. **CROSS-COMPLAINT TO RESCIND FOR MISTAKE AND FRAUD—SUPPORT OF CONTRARY FINDING.**—Where the defendant filed a cross-complaint to rescind the contract for mistake as to its contents induced by fraudulent representations of the plaintiff, *held*, that findings to the contrary are supported by the evidence and defendant had no right of rescission. (Id.)
30. **MODIFICATION OF JUDGMENT FOR CONVEYANCE—FREEDOM FROM LIENS—POSSESSION OF PLAINTIFF.**—Where plaintiff took possession, the contract providing for a conveyance free from all liens but the lease, the judgment should be modified so as not to charge defendant with liens after the date of plaintiff's possession, other than such as were made or suffered by the defendant, as at her instance, or for her benefit. (Id.)
31. **LEASE NOT AN ENCUMBRANCE—MERGED IN CONVEYANCE.**—The lease being merged in the conveyance provided for by the decree, is not an encumbrance and is not included in the liens to be provided against, in the decree for specific performance. (Id.)
32. **CONTRACT TO BUILD AND OPERATE RAILROAD—ACTION TO ENFORCE DEEDS OF FRANCHISES—REMEDY NOT MUTUAL.**—Specific perform-

SPECIFIC PERFORMANCE (Continued).

ance of a contract cannot be enforced where there is no mutuality of remedy between the parties; and since a contract to build and operate a railroad cannot be specifically enforced a railway company whose line is not substantially completed cannot enforce specific performance of contracts to convey to it rights of way, and franchises, and a bonus of acreage, and to compel deeds of the same for want of mutuality of remedy against the plaintiff. (*Pacific Electric Railway Company v. Campbell-Johnston*, 106.)

83. **WILLINGNESS OF PLAINTIFF TO PERFORM—IMPOSSIBILITY WITHOUT DEEDS—REFUSAL OF DEFENDANTS—REMEDY AT LAW.**—Neither the fact that the plaintiff is willing and has offered to complete its railroad upon the conveyances of the rights of way, franchises, and bonus of acreage agreed, nor that it has been constructed as far as it can be without such conveyances, nor the refusal by the defendants to permit it to be completed and operated over their lands, have any bearing on the equitable principle that where there is no mutuality of remedy there can be no specific performance. The railway company must be left to such remedies as it may have under the contract in an action at law. (*Id.*)

See Contracts, 3, 4.

STATE LANDS. See Prohibition; Tide-Lands.

STATUTES.

CONSTRUCTION OF STATUTES—IMPOSITION OF PENALTY—CONTRACT IN VIOLATION OF PROHIBITION.—As a general rule, the imposition by statute of a penalty implies a prohibition of the act to which the penalty is attached, and no recovery can be had on a contract made in violation of the statutory prohibition. The rule is, however, not without exceptions, and the statute must be examined as a whole to ascertain whether it intended that a contract in contravention of it should be void or not. (*Bentley v. Hurlburt*; *Hurlburt v. Bentley*, 796.)

See Corporations, 4, 5; Estates of Deceased Persons, 5, 11-17; Evidence, 3.

STATUTE OF FRAUD. See Boundary, 3.

STATUTE OF LIMITATIONS.

1. **PLEADINGS—COMPLAINT.**—A demurrer to a complaint, on the ground that the plaintiff's cause of action is barred by the statute of limitations is not good unless the complaint affirmatively shows that the statutory period has run since the accrual of the cause of action. (*Corea v. Higuera*, 451.)

STATUTE OF LIMITATIONS (Continued).

2. **DATE OF OBSTRUCTION OF WAY.**—In an action to establish the plaintiff's title to a right of way and to enjoin its obstruction by the defendant, a demurrer to the complaint on the ground that the cause of action is barred by the statute of limitations should not be sustained, where the complaint fails to show when the defendants first obstructed the road or interfered with plaintiff's use of it. (Id.)
3. **RELIGIOUS CORPORATIONS—AID TO CHURCH BY BUILDING SOCIETY—MORTGAGE CONDITIONS SECURING APPLICATION OF MONEY.**—Where a Congregational church building society advanced money to aid in the erection of a Congregational church, secured by mortgage, under an instrument the main purpose of which was to secure the application of the money to compel the continuous use of the property as a Congregational house of worship and to prevent a different use, and which contained specific and general conditions for the performance of the duties of the church, upon breach of which, the money secured was to be immediately due and payable, without notice or demand, and the property sold to pay the same, the statute of limitations does not begin to run against the will of the building society for breach of specific conditions known to exist more than four years before suit, which it must overlook and waive by acquiescence; and upon foreclosure of the mortgage for alleged breach of all the conditions, which is admitted by the answer, it is to be presumed that the cause of action is not barred by the statute of limitations. (Congregational Church Building Society v. Osborn, 197.)
4. **PRESUMPTION AS TO CONTINUED USE OF HOUSE OF WORSHIP.**—It is to be presumed that public worship was maintained, and the general functions and work of the church performed until a time within the period of limitation. These conditions constitute the principal matters intended to be secured, and the principal inducement for the money paid in aid of the church. (Id.)

See Boundaries, 2, 4; Dedication, 3, 4; Mortgage, 4-6; Pledge, 8; Quietting Title, 3.

STOCK AND STOCKHOLDERS. See Corporations.

STREET ASSESSMENT.

1. **ENFORCEMENT AGAINST LANDS OF STATE UNIVERSITY NOT USED FOR SCHOOL PURPOSES.**—An assessment for a street improvement by which lands held in trust for the state university, which are not in actual use for school purposes, are benefited in value, may be enforced against such lands, the same as against the property of a private owner. (City Street Improvement Co. v. Regents of the University of California, 776.)

STREET ASSESSMENT (Continued).

2. **EFFECT OF EXEMPTION FROM TAXATION.**—The exemption of land held by public agents from taxation, applies to general state, county, and municipal taxes, and does not extend to its exemption from a local assessment for a street improvement, enhancing the value, if not actually used for any public purpose. The rule in this state is that such property, when actually devoted to public use, is exempt from assessments under special laws, otherwise not. (Id.)

STREETS, ROADS AND HIGHWAYS. See Counties, 1-6; Municipal Corporations, 1-7; Specific Performance, 2, 4, 5.

SUPREME COURT.

In answer to a petition filed by Frank B. Ogden, now a judge of the superior court of Alameda County, for a review and modification of certain statements contained in the opinion of this court in the case of *Pekin Mining and Milling Company v. James Kennedy*, 81 Cal. 357, it is held that the statements in that opinion were based, of course, exclusively upon the findings made by the trial court, and were in no sense the result of an examination by this court, nor could they in any sense be construed as expressing the views of this court upon the matter; and that it is manifest that the exoneration of Judge Ogden upon the showing made in his petition is full and complete. This court also, from personal knowledge of Judge Ogden, joins in the expression of confidence embodied in the findings of the judges of the superior court of Alameda County; but, from the character and limits of the jurisdiction of this court, it is impossible for it to attempt to amend or correct the findings of the trial court, and so, impossible for it to afford the specific relief prayed for. The court orders the publication of its views in this matter, stating that it should suffice for the complete exoneration of the petitioner. (Petition of Ogden, 347.)

TAXATION.

1. **TAXATION OF STREET RAILROAD OPERATING IN MORE THAN ONE COUNTY—JUDGMENT SUSTAINING COUNTY ASSESSMENT—STATE NOT AGGRIEVED BY COUNTY ASSESSMENT IN EXCESS OF ASSESSMENT BY BOARD OF EQUALIZATION.**—In an action involving the question whether a street-railroad corporation, operating its lines in more than one county of the state, should be assessed by the state board of equalization and its taxes paid to the state controller, or by the county assessors and its taxes paid to the county tax-collectors, an appeal from a judgment by the state controller sustaining the validity of the county assessments and the payment to the county tax-collectors will be dismissed, when it appears that the amount received from the taxes for the benefit of the state, under the county

TAXATION (Continued).

assessments, is in excess of the amount that should the assessment by the state board tained. Under such circumstances, neither controller is a party aggrieved by the judgment of *San Francisco v. Colgan*, 53.)

2. MUNICIPAL CORPORATIONS — ASSESSMENT-FISCAL YEAR.—Where the assessment-book tation, the fiscal year of which commenced onuary, clearly shows by the affidavits of the clerk contained therein at the end of the which were required by the provisions of the Act, that the book was in fact the assessment the year 1904, and could be nothing else, then therein are not invalidated by the error on each double page of the book that it was the property of the city for the year 1904-19 *v. Wohlford*, 40.)
3. CITY OF ESCONDIDO—TAXING SYSTEM—CORPORATION—ADOPTION OF PROVISIONS OF POLITICAL CODE.—The ordinance of the city of Escondido, establishing assessment, levy, and collection of city taxes, that the provisions of the Political Code were "for assessing, levying and collecting city taxes in the manner, mode and persons are provided in the Corporation Act, did not adopt, as a part of the Political Code the subject-matter covered by the provisions of the Municipal Code for cities or towns of the sixth class. (*Id.*)
4. AUTHENTICATION OF ASSESSMENT-ROLL.—The authentication and authentication of the assessment-roll of the city of Escondido, class is fully covered by the provisions of section 10 of the Municipal Corporation Act, and, according to an ordinance of the city of Escondido, section 10 of the Political Code, requiring the assessment-roll of state to be authenticated by the affidavit of the county auditor, and a failure to conform thereto will not prevent the city from enforcing its tax.
5. DEED FOR IRRIGATION DISTRICT TAX—DESCRIPTION FOR UNCERTAINTY—EVIDENCE—IDEAL.—A tax-deed executed for non-payment of an assessment was objected to for uncertainty in the description. The objection is sufficiently met by evidence showing that the land was in fact sufficiently clearly to identify the land. (*Id.*, 17.)

TAXATION (Continued).

6. **SALE OF WHOLE INTEREST—LEAST QUANTITY OBTAINABLE.**—Where the tax-deed described the land assessed, and stated that the collector offered for sale the least quantity or smallest portion thereof to pay the assessments, costs, and charges, and that the grantee named was the bidder who was willing to take said least quantity and pay the same, and described said least quantity or smallest portion of the said land as the whole thereof again described and granted by the deed, the deed clearly shows that the whole of the land was the least quantity which any bidder was willing to take, and that the whole was in fact sold and intended to be conveyed by the deed. (Id.)
7. **CERTIFICATE SHOWING TIME FOR REDEMPTION—RECITAL IN DEED.**—Where the law required the certificate of sale to show the time for redemption, and that the matters contained in the certificate must be recited in the deed, a recital in the deed showing that the certificate stated that unless the said real estate was redeemed within twelve months from the specified date of said sale the purchaser would be entitled to a deed thereof, such recital in the deed sufficiently shows that the certificate complied with the requirement of the statute in stating the time for redemption. (Id.)
8. **DOUBLE ASSESSMENT—BOND ISSUE—SPECIAL ASSESSMENT FOR EXPENSES—ASSESSMENT-ROLL—TAX-DEED—PRIMA FACIE EVIDENCE.**—The objection that the assessment-roll showed a double assessment, one for a bond issue and the other a special assessment for expenses, which were not stated separately in the notice of sale, certificate of sale, or deed, goes to matters not shown on the face of the tax-deed, and was not a good objection to its admission in evidence as *prima facie* evidence of all prior proceedings. (Id.)
9. **DESCRIPTION OF PROPERTY IN NOTICE OF SALE—DITTO MARKS—ABBREVIATIONS—STATEMENT IN NOTICE.**—Though the notice of sale is that to which the taxpayer is absolutely entitled, and is not concluded by the deed, yet the use therein of ditto marks and abbreviations which could not mislead and which are explained in the notice, do not affect its validity or the sufficiency of its compliance with the law. (Id.)
10. **AGGREGATE AMOUNT OF ASSESSMENTS—AGGREGATE OF TAXES, PERCENTAGE, AND COSTS.**—The law does not require two assessments for the same year, on account of bond issue and for current expenses of the irrigation district, to be separately stated in the notice of sale, certificate of sale, or deed; and it is sufficient that the aggregate amount of the assessments and the aggregate amount of the taxes, percentage, and costs are correctly stated therein. (Id.)
11. **TAXATION OF SHARES OF STOCK IN DOMESTIC CORPORATION.**—Under the provisions of the state constitution, declaring that all property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided

TAXATION (Continued).

by law, and that the word "property" includes shares of stock, and sections 3617 and 3627 of the Political Code, it is the duty of the assessor to assess shares of stock in corporations organized under the laws of California at their full value, unless there is something in the provisions of such code which exempts them from such taxation. (*Chesebrough v. City and County of San Francisco*, 559.)

12. **VALUE OF SHARES OF STOCK, HOW DETERMINED—DOUBLE TAXATION.**—Under section 3608 of the Political Code, for purposes of taxation, the shares of stock in a corporation represent the value of the aggregate of the assets of the corporation, and have no value independent of the corporate property, and when all such property is assessed to the corporation it would be double taxation to assess the shares as well as the corporate property. Such result could only follow where all the property of the corporation was assessed to it, and would not result where none, or only a portion of the property of the corporation going to make up the value of the stock, was taxed to it. (*Id.*)
13. **PROPERTY OUTSIDE OF STATE—NO DEDUCTION ON ACCOUNT OF.**—While the value of the corporate shares is determined by the aggregate value of the corporate property, such property may or may not be within the jurisdiction of the state for purposes of taxation. If it is within the state, and assessed to the corporation, then the shares of stock cannot also be assessed to the stockholders, as that would constitute double taxation. But section 3608 of the Political Code does not exempt such shares from taxation when all the assets of the corporation are not taxed in this state by reason of the fact that some of them are beyond its jurisdiction. Neither is it material that the tangible property of the corporation is situated in some other state and has there been taxed. The fact that some of the property of the corporation is assessed in another state or country is no prohibition of the taxation of the shares of stock held here. The inhibition of double taxation only applies to such taxation in the same state or government. (*Id.*)
14. **CONSTRUCTION OF SECTION 3608 OF POLITICAL CODE—VALUE OF STOCK, HOW DETERMINED.**—Section 3608 of the Political Code, properly construed, only means that when the aggregate property of a California corporation is assessed in this state, shares of stock of the corporation shall not be assessed, but that if all such property is not here assessed the actual value of such stock, less the value of the corporate property which is assessed here, shall be taxed. Property of the corporation located outside of the state, and over which the state cannot exercise its sovereign power of taxation, is not to be considered in diminishing the actual value of the stock held here for purposes of taxation. A contrary construction of that section would render it unconstitutional. (*Id.*)

TAXATION (Continued).

15. **CONSTRUCTION OF STATUTE—CONSTITUTIONAL LAW.**—When a legislative enactment is capable of two constructions, one consistent and the other inconsistent with the provisions of the constitution, it should be so construed as to make it harmonious with the constitution and comport with the legitimate powers of the legislature. (Id.)
16. **METHOD OF ASCERTAINING TAXABLE VALUE.**—Sections 3617 and 3627 of the Political Code, defining cash values and declaring that all property should be assessed thereat, provides an adequate method of ascertaining the taxable value of such shares of a domestic corporation for assessment to the individual stockholders. (Id.)
17. **ACTUAL CASH VALUE OF STOCK—DEDUCTION OF VALUE OF CORPORATE PROPERTY IN STATE.**—In assessing shares of stock in a California corporation to the individual stockholders, the proper method to be followed by the assessor, in order to avoid double taxation and at the same time to assess the stock at its full cash value, is to deduct the value of the corporate property actually assessed in this state from the value of the shares, and to assess the stock as of the value diminished by the deduction. (Id.)

See Counties, 2, 6; Estates of Deceased Persons, 5-17; Mortgage, 7; Schools, 5; Street Assessment.

TENANTS IN COMMON.

1. **PURCHASE OF ENCUMBRANCE AND ADVERSE TITLE—ENFORCEMENT OF TRUST WITHIN REASONABLE TIME.**—One tenant in common of land, who purchases an outstanding encumbrance or an adverse title, will be chargeable as trustee for his companions in interest, if they choose within a reasonable time to claim the benefit thereof, by contributing or offering to contribute their proportion of the purchase money. (*Stevenson v. Boyd*, 630.)
2. **LAPSE OF REASONABLE TIME—LACHES IN EQUITY.**—Regardless of the question of the statute of limitations, if the right to enforce the trust as against a cotenant is not asserted within a reasonable time, and the plaintiff is chargeable with laches in equity, a court of equity will refuse to entertain the suit. (Id.)
3. **PRINCIPAL FACTORS OF LACHES—DISCRETION OF COURT OF EQUITY.**—The principal factors in determining whether the plaintiff has been guilty of laches, are acquiescence and lapse of time; but other circumstances are also material, such as a change in the value or character of the property. The matter is one which is left to the sound discretion of the court of equity, in each case. (Id.)
4. **LACHES OF COTENANT—PRESUMED REPUDIATION AND ABANDONMENT.**—Unless a cotenant claiming the benefit of a purchase, makes his election to participate within a reasonable time, and contributes

TENANTS IN COMMON (Continued).

or offers to contribute his ratio of the consideration actually paid, he will be deemed to have repudiated the transaction and abandoned its benefits. (Id.)

5. **LACHES OF APPELLANT AGAINST RESPONDENT—DEED OF TRUST BY COTENANTS—SPECIAL TRUST BY ONE—TITLE UNDER SALE.**—Where defendant's husband and appellant's grantor, as tenants in common of a tract of land, executed a deed of trust to secure a large loan from a bank, and appellant's grantor subsequently executed a special trust to appellant for his use for life, and for other uses specified, and the respondent wife, paid one half of the debt secured by the deed of trust and, upon a sale under the deed of trust, the title obtained was transferred in equal shares to defendant husband and respondent wife, who subsequently purchased her husband's interest at a large price, the property having greatly increased in value, and after the lapse of two days less than four years, from the date of the sale under the deed of trust, and over nineteen months after respondent's acquisition of her husband's title, she having since made improvements on the land and cultivated it in crops, the appellant as trustee for the beneficiaries under the deed of the other cotenant, sought to charge respondent as trustee of the title, *held*, that the suit of appellant as against the respondent, was properly decided by the court below to be barred by laches. (Id.)

See Dedication; Homestead, 6; Water and Water-Rights, 1-3.

TENDER. See Specific Performance, 8, 9.

TIDE-LANDS.

1. **SALE BY STATE.**—All tide-lands within any incorporated city or town other than San Francisco or Oakland are excluded from the operation of the provisions of law authorizing the sale of lands. (Williams v. City of San Pedro, 44.)
2. **TIDE-LANDS IN SAN PEDRO—VOID CERTIFICATE OF PURCHASE—ACTION BY HOLDER TO QUIET TITLE—COLLATERAL ATTACK.**—The provisions of section 3488 of the Political Code withheld from the state officers all authority to grant or sell tide-lands within the city of San Pedro; and a certificate of purchase for the same is void and may be collaterally attacked in an action by the holder of the certificate to quiet his title as against the city and other defendants, though they do not connect themselves with the title of the state. (Id.)
3. **POSSESSION OF TIDE-LANDS BY DEFENDANTS IMMATERIAL.**—In an action to quiet title to tide-lands, the plaintiff cannot prevail unless he shows title in himself; and the defendants, though not in possession of the lands, may effectually defend by showing that the

TIDE-LANDS (Continued).

certificate of purchase under which plaintiff claims title, is without authority of law and void, where plaintiff shows no possession of the lands in himself. [Shaw, J., non-concurring.] (Id.)

4. **CERTIFICATE OF PURCHASE NOT VOID ON ITS FACE—PRIMA FACIE EVIDENCE—FACTS ALIUNDE SHOWING INVALIDITY.**—If a certificate of purchase of tide-lands is not void on its face, it is only *prima facie* evidence of title; and the defendants in an action to quiet title, though claiming no interest in the lands, may, under denial of plaintiff's title, show by evidence *aliunde* that the lands described in it are in fact tide-lands not subject to sale, and that the certificate of purchase is therefore void. [Shaw, J., non-concurring.] (Id.)
5. **ADMISSION OF FACTS BY PLAINTIFF—OBJECTION TO CERTIFICATE OF PURCHASE PROPERLY SUSTAINED.**—Where plaintiff in offering the certificate of purchase admitted that the lands described therein are tide-lands within the limits of the city of San Pedro, the trial court did not err in sustaining the objection of defendants to the admission of the certificate in evidence. (Id.)

TITLE INSURANCE. See Insurance, 5-7.

TITLE TO LAND.

1. **ACTION TO QUIET TITLE UNDER MCENERNEY ACT—GRANTOR OF TRUST-DEED AS SECURITY.**—The grantor of a deed of trust intended as security for a loan of money may maintain an action under the provisions of the act of June, 1906, entitled "An act to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records," where the plaintiff's title is decreed subject to the provisions of the deed of trust. (Charles A. Warren Company v. All Persons, 771.)
2. **LEGAL TITLE IN TRUSTEE—ESTATE OF INHERITANCE LEFT IN TRUSTOR.**—The legal title under a trust-deed intended as security for a loan passes to the trustees solely for the purpose of enforcing the security according to its terms, but when the debt is paid the legal title becomes vested in the trustor or his successors in interest, and pending the existence of the security, the trustor retains an estate of inheritance, which may pass by devise or descent as against all persons except the trustees and those lawfully claiming under them. (Id.)
3. **DEEDS OF TRUST PROVIDED FOR IN STATUTE.**—Under section 5 of the act of 1906, the provision that the affidavit shall set forth, among other things, "a statement of any and all subsisting mortgages, deeds of trust, and other liens," unquestionably has reference to deeds of trust intended as security, and the legislature has thereby manifested its intention that the existence of such deeds of trust should not operate to deprive the trustor of his right to maintain the action. (Id.)

TITLE TO LAND (Continued).

4. **POSSESSION REMAINING IN TRUSTOR.**—The right to bring the action is limited by section 1 of the act, to any person who is by himself or his tenant or other person in the actual and peaceable possession of the property. The trustor has such possession, under a deed of trust, which conveys no right of possession to the trustee; and the trustor may maintain the possession and right of possession of the property, until the execution of the trust, when the trust-deed is silent upon the subject. (Id.)

See Adverse Possession.

TRESPASS.

1. **ACTION FOR PERSONAL INJURIES—ASSAULT AND BATTERY UPON TRESPASSER—FORCIBLE DISPOSSESSION BY OWNER.**—An action will not lie in favor of a trespasser upon land of the owner, who seeks forcibly to prevent the entry of the owner thereupon, to recover damages for personal injuries inflicted by the owner in dispossessing trespassers; provided no more force is used than is necessary to make the entry effective. (Walker v. Chanslor, 118.)
2. **COMMON-LAW RULE—CODE REMEDY FOR FORCIBLE ENTRY EXCLUSIVE.**—The common-law rule as to the right of an owner forcibly to dispossess trespassers, using only necessary force to that end, prevails in this state, except so far as modified by the code regulating forcible entry, which provides an exclusive remedy for trespassers in possession forcibly dispossessed by the owner. If the force used was not excessive, the trespassers can maintain no personal action against the owner. (Id.)
3. **EVIDENCE IN PERSONAL ACTION—FORCIBLE DISPOSSESSION OF OIL LAND—TITLE OF DEFENDANTS—SELF-DEFENSE—ADVICE OF COUNSEL.**—In a personal action for damages for the forcible exclusion of persons in possession of oil lands as adverse claimants, where the answer pleaded title in the defendants and self-defense against an adverse shooting by the occupants with weapons, after notice of plaintiff's title and demand of possession under advice of counsel, it was reversible error to exclude the evidence of defendants' title and of the other facts pleaded and offered in evidence. (Id.)
4. **RELEVANCY OF OFFERED EVIDENCE TO DAMAGES.**—The offered evidence as to title and as to the other matters bearing on the intentions and good faith of the defendants was relevant not only to the question of exemplary damages, but also as to the question of actual damages and as tending to show a complete defense to the action in the use of force only adequate to repel the attack and obtain the rightful possession of their property. (Id.)
5. **INJURY OF EMPLOYEE OF ADVERSE CLAIMANT—RIGHT OF DISPOSSESSION.**—If defendants as owners of the land had the right to dispossess the adverse claimants without title, they had the same

TRESPASS (Continu

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(Id.)

6. REVERSAL OF JUDGMENT AS TO EXCESSIVE
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TRUST.

1. ACTION BY ADMINISTRATOR OF ESTATE.—
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TRUST (Continued).

2. **CREATION OF TRUST IN PERSONAL PROPERTY—PAROL EVIDENCE.**—A valid trust in personal property may be created by parol, if the evidence shows an intention to create a trust, and shows the subject, purpose, and beneficiary of the trust. It was possible for the intestate while retaining the legal title to the shares of stock to create a trust therein in favor of the beneficiary, by a declaration that she held the shares in trust for her benefit. (Id.)
3. **RESERVATION OF POWER OF REVOCATION—POSTPONEMENT OF ENJOYMENT.**—The reservation of a partial or total power of revocation, is not inconsistent with the establishment of a trust; nor is it an objection that the right of enjoyment by the beneficiary is postponed, provided an immediate interest is given, subject to such postponement. (Id.)
4. **SUFFICIENCY OF EVIDENCE—SUPPORT OF FINDING AGAINST CREATION OF TRUST.**—*Held*, that while there may be sufficient evidence to have justified a finding that the intestate so dealt with the shares as to show an intent to immediately vest the shares in the beneficiary named which should remain at her death; yet there was sufficient evidence to sustain the finding that no trust was created. [Beatty, C. J., dissenting.] (Id.)
5. **QUESTION OF FACT—PROVINCE OF TRIAL COURT.**—In the case of a trust in personal property, it is for the trial court to determine as a question of fact whether the words and acts of the alleged trustor indicated with reasonable certainty an intention to create a trust, and the subject, purpose, and beneficiary of the trust; and if there is any evidence consistent with its finding that a trust was not created, the finding of the lower court must stand. (Id.)
6. **EVIDENCE CONSISTENT WITH FINDING—CONTROL OF PROPERTY BY TRUSTOR FOR LIFE.**—Evidence tending to show that the intestate during her life did not intend to put the property out of her control, and wished to be assured that she could have the use and control of the whole or any part thereof as long as she lived, and that she told the third party who held the shares to keep the certificates for her, is consistent with the finding that no trust was created, and would justify the inference that she was not transferring any present interest in the shares, but was merely endeavoring to arrange a disposition of them to take effect at death. (Id.)
7. **INEFFECTUAL GIFT—INEFFECTUAL WILL—TRUST NOT CREATED.**—An ineffectual attempt to make a gift does not create a trust, and equity will not perfect an imperfect gift by establishing a trust when none was in contemplation, nor can a trust be created by an ineffectual attempt at a testamentary disposition of property in the absence of a will duly attested, when the full control of the property was maintained during life, without intent to vest any interest therein prior to death. (Id.)

TRUST (Continued).

8. **CASE IN EQUITY—TRIAL BY COURT.**—An action for the cancellation of shares of stock held by the executor of the deceased wife, as part of her estate, and to compel the defendant corporation to issue new shares in lieu thereof, is a case in equity, which was properly tried by the court; and the appellant was not entitled to demand a trial thereof by jury. (Id.)

See Homestead, 1-5; Husband and Wife, 3-7, 15-19; Insane Persons, 9, 11; Quieting Title, 3; Tenants in Common; Title to Land; Wills, 2, 5.

UNIVERSITY OF CALIFORNIA. See Street Assessment.**VENDOR AND VENDEE.**

1. **ACTION FOR INSTALLMENTS OF PURCHASE PRICE.**—The fact that a vendor under a contract for the sale of land has parted with his title is no defense to an action by him against the vendee on the contract of sale to recover intermediate installments of the purchase price. When the final installment falls due, it will for the first time become important to ascertain whether the vendor is able to comply with his agreement to convey a good title. (Bentley v. Hurlburt, 796.)
2. **OPTION TO PURCHASE LAND—UNILATERAL CONTRACT—TENDER OF PERFORMANCE.**—An option for the purchase of land, which by its terms contains a promise by the owner to sell on certain conditions, without any obligation to buy on the part of the person to whom the option is given, is a unilateral contract, and becomes mutual only in the event that the latter should, within a reasonable time and before a withdrawal of the offer, make tender of performance on his part. Performance upon the part of him to whom the option runs consists of a valid tender of the amount due under the contract, coupled with a demand for a deed. (Levy v. Lyon, 213.)
3. **OWNER MAY QUIET TITLE.**—The owner of the land may maintain an action to quiet his title thereto against the person to whom such option was given, and who, for more than four years after the execution of the option, has failed to make tender of performance. (Id.)

See Specific Performance.

VENUE. See Place of Trial.**WARRANTY. See Contracts, 5-9; Franchise, 4; Sale, 1-4, 5.**

WATER AND WATER-RIGHTS.

1. **WATER-RIGHTS—USER OF DITCH BY COTENANTS—DECREE IN PARTITION—EXTENT OF USER ON EACH TRACT.**—Where several cotenants who are severally in possession of portions of a rancho, which were subsequently allotted to them in partition, constructed jointly a ditch over the lands of one of them for use on their respective lands, the extent of the easement of each over such lands is to be determined by the extent of their user at the time of the partition decree, unless a prescriptive title to a greater user has been there-after acquired. (*Anaheim Union Water Company v. Ashcroft*, 152.)
2. **TITLE BY PRESCRIPTION—PROOF OF ADVERSE USER.**—*Held*, that the evidence is insufficient to show that the defendant Aros had acquired a prescriptive title after the partition decree to any greater user on his lands; but that the evidence is sufficient to sustain a finding that the defendants Ashcroft had acquired by adverse user a prescriptive title to irrigate their entire tract. (*Id.*)
3. **EXPRESS DECLARATION OF ADVERSE USER NOT ESSENTIAL—SUFFICIENCY OF PROOF.**—In order to support a title to an increase of water by prescription, an express declaration of the adverse user is not essential. It is sufficient that there is satisfactory proof of a continuous, open, notorious, and uninterrupted use of the waters on the lands of said defendants for the statutory period, of such a character as unquestionably to indicate that the use was being exercised in hostility to the right of any person to interfere with its exercise. (*Id.*)
4. **WATER-RIGHTS—RIPARIAN PROPRIETORS—OCCASIONAL DRYNESS OF STREAM—CHANGE OF CHANNEL.**—The facts that the bed of a stream does not at all seasons of the year carry a flowing body of water, and that the location of the channel of the stream is subject to change, are not inconsistent with the existence of a natural watercourse, nor do they deprive those owning land fronting on the bed of the stream of the character of riparian proprietors. (*Huffner v. Sawday*, 86.)
5. **RIPARIAN PROPRIETOR—INJUNCTION—INJURY NEED NOT BE SHOWN.**—The right of a riparian proprietor to restrain the diversion by others than riparian owners of water which would, if undisturbed, flow past his lands does not rest upon the extent to which he has used the water, nor upon the injury which might be done to his present use. Even if a riparian proprietor has never made any use of the water flowing past his land, he has the right to have it continue in its customary flow, subject to such diminution as might result from reasonable use by other riparian proprietors. This is a right of property, a part and parcel of the land itself, and the riparian proprietor is entitled to have restrained any act which would infringe upon such right. (*Id.*)

WATER AND WATER-RIGHTS (Continued).

6. **APPROPRIATOR MUST SHOW INJURY TO RESTRAIN DIVERSION.**—One entitled to a water-right in a stream which is based upon prior appropriation and use cannot restrain a diversion of the waters of the stream without showing that the diversion would diminish the flow of water which he had been receiving for use. (Id.)
7. **INADEQUATE SUPPLY OF WATER—CONTINUITY OF USE.**—The fact that an appropriator of water, for several years prior to the commencement by him of an action to restrain an unauthorized diversion, by reason of the dryness of the seasons, had not been able to get as much water as theretofore did not destroy the continuity of his use, nor deprive him of the right to use the amount formerly diverted in the event that the flow of the stream should again furnish such amount. (Id.)
8. **DIMINISHED SATURATION OF BED OF STREAM.**—The diversion of water from the upper portion of a stream, the natural effect of which is to prevent or diminish the saturation of the sandy bed underlying the stream and thereby materially postpone the time when a surface flow would come to the lands of a lower appropriator, is a material injury to such lands. (Id.)
9. **INJUNCTION AGAINST DIVERSION—RIGHT TO FLOOD WATERS.**—Defendants who have been enjoined at the instance of riparian proprietors and appropriators from diverting any of the waters of a stream cannot complain of the judgment, which was otherwise correctly rendered, merely because it did not specifically reserve to them a right to the flood waters of the stream, when no such right was asserted in their answer. (Id.)
10. **JUDGMENT—RETURN OF WATER TO STREAM.**—A decree enjoining the unlawful diversion of the waters of a stream at the instance of lower riparian proprietors and appropriators is not erroneous in failing to permit the diversion on condition that the water was returned to the stream above the plaintiffs' land undiminished in its natural flow, when there is evidence showing that such a return would have been a physical impossibility. (Id.)

WAY.

1. **WAY OF NECESSITY—CESSATION OF NECESSITY—DEDICATION OF ROAD.**—A way of necessity over the lands of a grantor arises from necessity alone and continues only while the necessity exists. After the grantor has dedicated over his lands a road for the use of the grantee, the latter's right to a way of necessity ceases, notwithstanding the road so established is less convenient than the way previously used. (*Cassin v. Cole*, 677.)
2. **WAY OF NECESSITY—ELEMENTS ESSENTIAL TO EXISTENCE OF RIGHT.**—A right of way of necessity does not exist except in cases of strict necessity. That a way over the grantee's land is too steep,

WAY (Continued).

or too narrow, or that other and like difficulties exist, does not alter the case, and it is only when there is no way through his own land that a grantee can claim a right over that of his grantor. It must also appear that the grantee has no other way. (*Corea v. Higuera*, 451.)

3. **RIGHT OF WAY PASSES WITH LAND.**—A right of way which is appurtenant to land passes with the transfer of the land. (*Id.*)
4. **PLEADING—FINDINGS—EXISTENCE AND OWNERSHIP OF RIGHT OF WAY.**—An allegation in a complaint to establish the plaintiff's title to a designated right of way, to the effect that he is the owner of such right of way over the defendants' land, and that such easement is appurtenant to his land, is a sufficient averment of the ultimate fact of the existence of the right of way and of his ownership, and findings in accordance therewith are sufficient to support a judgment in favor of the plaintiff declaring him to be the owner of the right of way, and enjoining its obstruction. (*Id.*)
5. **EXTINGUISHMENT OF RIGHT OF WAY.**—If plaintiff's right of way was extinguished by disuse, and such extinguishment did not appear on the face of the complaint, the fact, if it existed, was matter of defense to be set up in the answer and proved by the defendant. (*Id.*)

See Statute of Limitations, 1, 2.

WILLS.

1. **CONTEST OF PROBATE—CONFLICTING EVIDENCE—SUPPORT OF FINDING.**—The rule that a verdict or finding will not be disturbed upon appeal where there is a real and substantial conflict of evidence on the issue of facts involved applies to litigation over the validity of wills, as well as to any other kind of litigation. Upon a contest of the probate of a will, where, notwithstanding conflicting evidence, there was sufficient evidence and circumstances in proof to sustain the court in finding that when the will was made the deceased was of unsound mind and incapable of making a will, and that the proposed will was not his will, such finding cannot be disturbed. (*Estate of Doolittle*, 29.)
2. **VOID TRUST—INTESTACY.**—Where a trust attempted to be created by a will is void, if there are no other apt words in the will disposing of the property affected thereby, intestacy as to it is the result. (*Estate of Heberle*, 275.)
3. **CONSTRUCTION IN FAVOR OF TESTACY.**—A construction of a will which favors testacy is always preferred to one resulting in intestacy. (*Id.*)
4. **"DISTRIBUTED"—MEANING OF.**—The word "distributed" is not a technical word in conveyancing and is not usually found in deeds. If it has any legal technical meaning it has such meaning with reference to decrees of distribution in probate courts. (*Id.*)

WILLS (Continued).

5. **DISPOSITION OF PROPERTY AFFECTED BY VOID TRUST.**—Where a trust attempted to be created by a will in specified real estate is void, further provisions of the will, to the effect that in the event of the testator's disposing of such property, his trustees should pay the proceeds thereof to the beneficiaries of the trust, and, if not so sold, the property "is to be kept and distributed to" such beneficiaries, evince an intention on the part of the testator that such property or its proceeds should, either with or without a trust, pass to the persons designated as beneficiaries. (Id.)
6. **CONVEYANCE OF EXPECTANCY BY HEIR—AGREEMENT NOT TO CONTEST WILL—PLEADING—FAIRNESS—ADEQUACY OF CONSIDERATION—PUBLIC POLICY.**—Though the general rule is, that where an heir conveys his expectancy in the estate of his ancestor, or agrees with other heirs before his ancestor's death, not to contest the ancestor's will, such conveyance or agreement is deemed invalid, unless facts are pleaded and proved showing that the same was fairly obtained, and that the consideration was full and adequate; but, when such showing is made, the execution of such conveyance and agreement is not against public policy, but is valid and binding. (Estate of Wickersham, 603.)
7. **PETITION BY HEIRS OF DECEASED SON TO REVOKE PROBATE OF WILL.—SUFFICIENCY OF ANSWER—COMPROMISE AGREEMENT—FAIRNESS AND ADEQUACY.**—Where the widow and child of a deceased son of the testatrix, petitioned the court to revoke the probate of his mother's will, and the answer thereto set forth a compromise agreement between all parties interested, where the son was contesting his father's will, that he should dismiss the contest thereof, and agree not to contest his mother's will, and should assign and convey all of his interest in the estate of each, and set forth facts, showing a reasonably full and adequate consideration for the whole compromise agreement, moving from his father's estate, and from his mother personally, and that the son was fully advised of all the facts, and acted freely without coercion in the whole matter, *held*, that the son was barred and estopped from contesting the validity of his mother's will, and that the petitioners had no standing to revoke the probate thereof. (Id.)
8. **SUFFICIENCY OF PLEADING—DIRECT AVERMENT OF ADEQUACY OF CONSIDERATION NOT ESSENTIAL.**—The averment of adequacy of consideration is of a legal conclusion, and would not be sufficient, without setting forth the facts showing it; and the absence of such direct averment, will not vitiate the pleading, where sufficient facts are set forth to establish it. (Id.)
9. **RULE FOR CONSTRUCTION OF PLEADING—CODE RULE BINDING UPON COURTS.**—It has been often said that pleadings are to be construed most strongly against the pleader; but the true and accurate-

WILLS (Continued).

statement of the rule binding upon the court under section 452 of the Code of Civil Procedure, of a pleading, for the purpose of determining questions must be liberally construed, with a view to the facts between the parties." (Id.)

10. **POSTPONEMENT OF CONTEST—DISTRIBUTION OF DECEASED SON—DISCRETION.**—The court refused to postpone the contest raised by the probate of the will of the mother (the final distribution of the estate of his) the facts show no abuse of discretion. (Id.)
11. **JURISDICTION TO TRY ISSUE OF ESTOPPEL ORDER OF PROOF.**—The court upon the hearing to revoke the probate of the will, had jurisdiction of estoppel, and of the interest of the plaintiff in the estate of his deceased mother, and of the order of proof and to require the contestant to show interest. (Id.)
12. **PRODUCTION OF COMPROMISE CONTRACT—EVIDENCE.**—Where the parties answered the estoppel, rested upon the production of which set forth very fully the negotiation of the contract, the consideration, purposes, and intention were entitled to rely upon its recitals as proof of the facts necessary to give it validity and effect. (Id.)
13. **SUPPORT OF FINDINGS.**—*Held*, that there was no support for the findings based upon the averments that findings must be sustained, where the facts thereto is substantially conflicting. (Id.)
14. **DECISION UPON APPEAL IN ESTATE OF DECEASED FATHER AS TO ESTATE OF DECEASED MOTHER.**—A former appeal as to the interest of the deceased father, is not the law of the case as to the estate from his mother, which was not adjudicated upon that appeal; nor can the court's opinion on that subject, constitute the law of the case. (Id.)
15. **RESULT OF PRIOR CONTEST—CONTEST AS TO MENTAL CAPACITY—UNDUE INFLUENCE.**—Where a will had been contested before the court on the issue of capacity of the testatrix, by an uncle, and the will was found on that issue, and the judgment in favor of the presumption against undue influence was contested after probate, by another party on the issue of mental capacity and for undue influence;

WILLS (Continued).

was insufficient upon the second contest to establish either ground, and that a showing of the mere possibility of undue *influence* or opportunity therefore was not sufficient to establish it. (*Estate of Dolbeer*, 652.)

16. **MOTION TO CHANGE VENUE OF SECOND CONTEST—DISQUALIFICATION OF JUDGE NOT SHOWN.**—Where the contestant after probate *moved to* change the venue upon affidavits that the judge had expressed a *fixed* opinion in favor of the validity of the will and was biased and prejudiced against the second contest, without charging any bias or prejudice against the litigant, the showing is insufficient to disqualify the judge from trying the second contest, and the motion was properly denied. (*Id.*)
17. **FINDING MADE ON FORMER CONTEST—BIAS AND PREJUDICE NOT IMPUTABLE ON SECOND CONTEST.**—The circumstance that the court, on the former contest, upon which the question of undue *influence* was not in issue, in its formal proof of facts found that the will was executed by the deceased when free from undue *influence*, merely upon the legal presumption of the absence of fraud or undue influence, where there is failure of allegation or proof of either, can under no circumstances be the foundation for the imputation of bias or prejudice on that account, upon the second contest, on an issue expressly joined upon that question. (*Id.*)
18. **JURY TRIAL NOT REQUIRED ON SECOND CONTEST.**—The right to a jury trial in probate proceedings is purely statutory, and does not exist if the statute does not provide for it. Where a jury trial was had upon a contest before probate, the right does not *exist* upon a second contest after probate under section 1330 of the Code of Civil Procedure. (*Id.*)
19. **CONSTRUCTION OF CODE.**—The special provision in section 1330 of the Code of Civil Procedure, is the latest expression of the legislative will as to a jury trial on a second contest of a will. Furthermore, that special provision in article IV of chapter II must prevail over general provisions as to jury trials, in sections 1716 and 1717 of the same code. (*Id.*)
20. **DISCRETION AS TO JURY TRIAL ON SECOND CONTEST—FACTS CONSIDERED—POLICY OF LAW—CURTAILMENT OF DILATORY PROCEEDINGS—TRIAL BY COURT.**—Upon the question of discretion of the court as to a jury trial of the second contest, after probate, by a brother of the first contestant, it is to be considered that the *second* contestant was familiar with the facts concerning the jury trial had upon the first contest before probate, and its final result in favor of the validity of the will. In view of such jury trial and its result, it is the policy of the law to curtail further dilatory proceedings in the settlement of the estate, and that subsequent contests should be

WRIT OF REVIEW.

VILLS (Continued).

- expeditiously tried by the court. It was not an ab but within the well-defined policy of the law, for th a jury trial under the circumstances shown. (Id.)
21. CITATION OF PARTIES INTERESTED—SERVICE UPON ESSENTIAL—ABSENCE OF INJURY TO CONTESTANT.—the Civil Code as to the citation of parties int contemplate or require the delay of the proces service of all other heirs who are not provided for whose interest is with that of the contestant. are proper, but not necessary parties, and wher failed in his contest, he is not injured by the failu heirs with citation. (Id.)
22. EVIDENCE—EXAMINATION OF BENEFICIARY BY COM SITION—SURPRISE—CONTRARY DECLARATIONS INAD the principal beneficiary charged with undue influer a witness for contestant, the contestant cannot evidence conforming to her deposition, nor can tl the ground of surprise at her answers, offer cont made out of court, if the exceptional case does not surprise, the witness has given affirmative hostile evidence unexpectedly, which such declarations could r
23. QUESTIONS CALLING FOR HEARSAY TESTIMONY.—(for hearsay testimony are inadmissible on that g not form ground for introducing contrary declaratio of surprise. (Id.)
24. DECLARATIONS OF ONE LEGATEE NOT ADMISSIBLE.—one legatee are not admissible in evidence because 1 the other legatees, and the same rule holds whet is addressed to the mental unsoundness of the tes question of undue influence. (Id.)

WRIT OF ASSISTANCE. See Partition, 3-5.

WRIT OF REVIEW. See Certiorari.

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